Robert E. Davies, Esq. (SBN 106810)
Mary A. Stewart, Esq. (SBN 106758)
Donahue Davies LLP
1 Natoma Street
Folsom, CA 95630-2614
Telephone: (916)-817-2900
Facsimile: (916) 817-2644
E-mail: rdavies@donahuedavies.com
E-mail: mstewart@donahuedavies.com

Mark T. Clouatre (Colorado Bar No. 29892) *Pro Hac Vice*
Jacob F. Fischer (New York Bar No. 5025788) *Pro Hac Vice*
Nelson Mullins Riley & Scarborough LLP
1400 Wewatta Street, Suite 500
Denver, CO 80202
Telephone: (303) 583-9900
Facsimile: (303) 583-9999
E-mail: mark.clouatre@nelsonmullins.com
E-mail: jake.fischer@nelsonmullins.com

Attorneys for Respondent General Motors LLC

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of

FOLSOM CHEVROLET, INC. d/b/a FOLSOM CHEVROLET,
Protestant,

v.

GENERAL MOTORS, LLC,
Respondent.

Protest No.: PR-2483-16

RESPONDENT GENERAL MOTORS LLC'S REPLY TO PROTESTANT'S POST-HEARING BRIEF

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Respondent General Motors LLC ("General Motors" or "GM") submits the following Reply in response to the Post-Hearing Brief filed in connection with this protest by Protestant Folsom Chevrolet, Inc. d/b/a Folsom Chevrolet ("Folsom Chevrolet").

INTRODUCTION

In January, the parties engaged in a two-week administrative hearing to determine whether GM has good cause to end its Chevrolet business relationship with Folsom Chevrolet. General Motors presented a mountain of undisputed evidence, including expert analysis, to demonstrate good cause. In its Opening Brief ("GM Br.") and companion Proposed Findings of Fact ("GM PFF"), General Motors thoroughly and accurately recounted this evidence, summarizing key points and providing numerous citations to the record.

Folsom Chevrolet's Post-Hearing Brief ("Br.") and Proposed Findings of Fact ("FC PFF"), by contrast, are riddled with omissions and inventions. For example, the dealership ignores its agreement to become responsible for more sales territory following the bankruptcy of General Motors Corp., its long history of poor sales, and GM's extensive efforts to help the dealership become more successful. Most notably, Folsom Chevrolet studiously avoids any discussion of its fleet department practice of selling inventory to fleet customers.

Yet these omissions pale in comparison to the dealership's unsupported and erroneous claims regarding GM, its experts, and the provisions of the Dealer Sales and Service Agreement ("Dealer Agreement") between the parties. For example, the dealership repeatedly claims that GM has breached the Dealer Agreement by changing various standards relating to sales and service. However, in each case, the standards advocated were concocted by Folsom Chevrolet after the fact, and nothing in the record supports their use.

Furthermore, Folsom Chevrolet makes a number of claims regarding RSI, but fails to prove that RSI is unreasonable. Substantial evidence in the record supports the reasonableness of RSI, including on every factor to be considered under California Vehicle Code Section 11713.13(g). In addition, the evidence in the record weighs overwhelmingly in favor of good cause on each of the statutory good cause factors. As a result, Folsom Chevrolet has failed to substantiate its protest, and General Motors has good cause to terminate the Dealer Agreement.

ARGUMENT

I. FOLSOM CHEVROLET'S OMISSIONS AND INVENTIONS

A. Folsom Chevrolet's Post-Hearing Brief Omissions

Folsom Chevrolet's Post-Hearing Brief and companion Proposed Findings of Fact make many contentions which are either inaccurate or unpersuasive. Before addressing them, however, it is telling to first review some of the topics and evidence the dealership has chosen to sidestep and ignore.

The most glaring of these omissions is the absence of any discussion of Folsom Chevrolet's fleet practices. The issue of retail vs. fleet sales was central to the hearing, with numerous witnesses from both sides testifying to both Folsom Chevrolet's practices and the problems they caused. The testimony and evidence were expansive enough, and important enough that it spans fully fourteen pages and fifty paragraphs of GM's Proposed Findings of Fact. (GM PFF ¶¶ 125-175.) Yet aside from some questionable arguments regarding the Dealer Agreement and the concocted "TSI" metric, Folsom Chevrolet virtually ignores the topic altogether.

Thus, Mr. Stinson's observation that Folsom Chevrolet had "pockets of deficiency" and a "constant imbalance" in its inventory due to fleet sales taken and made from its inventory—a "glaring" problem—was not addressed. (GM PFF ¶¶ 159-160.) Similarly unmentioned were Mr. Stinson's and Mr. Escalante's constant, but unheeded, efforts to get the dealership to change its fleet practices. (GM PFF ¶¶ 164-165.) Nor did Folsom Chevrolet provide any explanation of Mr. Crossan's damning admission, in writing, that "our large number of fleet sales diminishes our inventory levels and adversely impacts our ability to make additional retail sales." (GM PFF ¶ 168; R226.002.) In fact, the July 2015 letter in which Mr. Crossan made that admission, as well as his follow-up conversation with a GM representative, is not discussed in Folsom Chevrolet's Opening Brief at all. (*See* GM PFF ¶¶ 168-170.) Nor did Folsom Chevrolet acknowledge the immense profitability of its fleet department, or the damaging impacts on retail business that those profits created. (*See* GM PFF ¶¶ 172-175.)

These inventory problems were largely self-caused, but General Motors went out of its way to try to help. However, neither the Opening Brief nor the Proposed Findings of Fact make any mention of the fact that General Motors representatives Saul Escalante[1] and Paul Ryan provided the dealership with hundreds of additional vehicles through "STMI" discretionary allocation. (GM PFF ¶ 234.) Folsom Chevrolet also fails to acknowledge its own witnesses' testimony that the isolated manufacturing constraints it complains about with respect to allocation equally affect every other Chevrolet dealer—and thus had no appreciable impact on Folsom Chevrolet's relative sales performance. (GM PFF ¶ 232.)

Folsom Chevrolet also complains about GM's calculation of its expected retail sales, but the short factual history of the dealership omits the fact that it was able to achieve substantially higher sales volumes in the early 2000s than it is expected to achieve today. (GM PFF ¶¶ 36-39, 286.) Nor does Folsom Chevrolet acknowledge that it outright agreed to accept an expanded sales territory in 2009 (GM PFF ¶¶ 41-44), or that, after that territory was added, it repeatedly chose not to object to the addition (GM PFF ¶¶ 238-245). Folsom Chevrolet's brief also ignores the evidence showing that other dealers in the Northern California zone received increased sales territory, and had an attendant increase in expected retail sales, following the General Motors Corporation bankruptcy, but were able to meet their new, higher level of expected retail sales. (GM PFF ¶¶ 292-296.)

Nor does Folsom Chevrolet acknowledge that the volume of sales it is expected to achieve is nearly the same as, if not less than, the other dealers in the Sacramento APR. (GM PFF ¶ 249.) Thus, in 2016, Folsom Chevrolet was expected to sell 1,324 vehicles, while John L. Sullivan was expected to sell 1,396, Kuni 1,355, and Maita 1,182. (*Id.*) Unlike Folsom Chevrolet, however, the other Sacramento dealers are sales effective, performing at an average RSI of 97.1. (GM PFF ¶ 289.) Folsom Chevrolet also makes no reference to the fact that its closest competitors in the Folsom Auto Mall—Ford and Chrysler—are easily able to achieve the sales volume GM expects of Folsom Chevrolet. (GM PFF ¶ 288.) And of course, Folsom Chevrolet does not mention the fact that its new General Manager, Mr. Kaestner, testified that "to do a hundred cars a month or to do 125 or 150 cars a month"—roughly Folsom Chevrolet's sales expectations—is such a small sales volume that "it's

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[1] Mr. Escalante's 200+ counseling visits to the store are omitted from Folsom Chevrolet's retelling entirely. (GM PFF ¶ 69.)

like watching paint dry." (GM PFF ¶¶ 290-291.)

With respect to its retail sales performance, Folsom Chevrolet simply skips past its long history of underperformance since the 2009 GM Corporation bankruptcy. In fact, the dealership makes no reference whatsoever to its sales between 2010 and 2014. (*See* FC PFF ¶¶ 11-14; Br. at 6-7.) And while Folsom Chevrolet states it created a BDC at GM's urging sometime after the performance improvement process began in 2014 (*see* Br. at 7), it simply ignores the testimony and evidence demonstrating that this BDC was not functioning as intended. (GM PFF ¶¶ 187-194.)

Folsom Chevrolet also omits any reference to its dealer customer loyalty reports, which showed that customers routinely chose to go elsewhere after making a purchase from Folsom Chevrolet. (*See* GM PFF ¶¶ 199-200.) Between February 2012 and May 2015, its 3 month loyalty trend never once reached the average of the District, Zone, Region, or Nation, falling to a low of approximately five to six percent in 2014—meaning only 1 in 20 customers who purchased a vehicle from Folsom Chevrolet returned to purchase one there again. (*Id.*)

Folsom Chevrolet's discussion of the expert issues in the case is also replete with omissions. One example involves Mr. Stockton's "Total Sales Index" ("TSI"). Folsom Chevrolet spends several pages discussing Mr. Stockton's TSI, and even lays out the calculation in great detail. (Br. at 24-28.) Indeed, Folsom Chevrolet's scores under the TSI metric are provided twice, with the dealership stating that they "establish[] that Folsom Chevrolet is above average for total new car sales in the state." (Br. at 27, 42.) But nowhere does Folsom Chevrolet admit that Mr. Stockton testified *five different times* that he does not advocate the use of TSI as a performance measure. (RT Vol. 7, 89:16-22, 89:23-90:22, , 112:7-11, 120:9-17, 122:19-23 (Stockton).) It is as though that testimony never occurred.

With respect to investments, Folsom Chevrolet again omits important information. For example, the dealership states that its "goodwill and franchise value is highly permanent," citing to Mr. Woodward's testimony. (Br. at 35.) However, it fails to acknowledge Mr. Woodward's testimony that he doesn't "know where you tie [goodwill] into the word 'investment,'" and "[i]t's possible it's not permanent." (RT Vol. 6, 32:8-15, 73:25-74:6 (Woodward).) Nor does Folsom Chevrolet admit that the sole basis for many of the valuations provided by Mr. Woodward was not financial reports, professional appraisals, or his own analyses, but instead the uncorroborated statements of Folsom Chevrolet's counsel. (*See* PFF ¶¶ 348-350.) Indeed, the only documents he reviewed at all were "one or two financial statements." (PFF ¶ 348.)

Finally, Folsom Chevrolet frequently argues that the facility and real estate owned by Mr. Crossan may go vacant because GM has a lease which gives it "complete control over the dealership property" but "allows it to walk away from the lease with 30 days notice" in the event of termination. (Br. at 35.) However, testimony at the hearing established that General Motors has no intention of "walk[ing] away from the lease," but instead plans to continue to operate a Chevrolet dealership from the existing facility. (*See* RT Vol. 1, 204:13-21 (Stinson) ("we definitely want the point"); RT Vol. 4, 103:21-24, 113:4-16 (Meier); RT Vol. 4, 172:22-175:4, 236:21-22 (Gaspardo).) Accordingly, the dealership's argument that its facility may go vacant in the event of termination is hollow.

B. Folsom Chevrolet's Post-Hearing Brief Inventions

In addition to the above omissions, Folsom Chevrolet's briefing makes numerous claims that either misrepresent the factual record or the contractual terms and metrics at issue. Several of these claims are discussed below, while others are examined in context later in this brief.

1. The Dealer Agreement Makes a Clear Distinction Between Fleet and Retail Sales

Folsom Chevrolet claims that "[w]ith respect to sales performance, the terms of the franchise do not state that General Motors will exclude from consideration sales made to buyers who have more than 15 vehicles in service, or who purchase 5 or more vehicles in a given year," *i.e.*, fleet purchasers. (Br. at 42.) Folsom Chevrolet then goes on to state that "[t]he sales efforts clause of the agreement"—§ 5.1.1—"makes no distinction between Fleet and retail sales." (*Id.*)

This is plainly false. It is true that the article of the Dealer Agreement cited by Folsom Chevrolet, Article 5.1.1, states that "Dealer agrees to effectively, ethically, and lawfully sell and promote the purchase, lease and use of" Chevrolet vehicles. (R201.009 § 5.1.1.) However, it then lists several things Dealer must agree to do in order to "[t]o achieve this objective," and one is that Dealer must "comply with the ***retail*** sales standards established by General Motors." (*Id.* (emphasis added).)

Article 9 of the Dealer Agreement, titled "Review of Dealer's Sales Performance," then makes clear that satisfaction of the dealer's sales obligation under Article 5 will be measured by its *retail* sales performance. In that article, the Dealer Agreement states that GM will provide a "written report at least annually . . . evaluating Dealer's sales performance." (R201.017 § 9.) The article continues: "The report will compare Dealer's ***retail*** sales to ***retail*** sales opportunities by segment in" the applicable APR or AGSSA. (*Id.* (emphasis added).) It also states: "Satisfactory performance of Dealer's sales obligations under Article 5.1 requires Dealer to achieve a ***Retail*** Sales Index equal or greater than 100." (*Id.* (emphasis added).)

As is evident by its name, RSI measures retail sales—or, to use Folsom Chevrolet's framing, it "exclude[s] from consideration sales made to" fleet purchasers. (RT Vol. 2, 461:23-462:1 (Giguere).) If there were any confusion, the Sales Performance Reviews that provide Folsom Chevrolet with its RSI report "in accordance with Article 9 of the Dealer Sales and Service Agreement" specifically state that for "Sales and Registrations," "vehicles sold to and registered by national fleet accounts for GM are excluded from this analysis." (*See, e.g.*, R242A (2012 SPR) at 1, 4, 6.)

Thus, Folsom Chevrolet's contention that the terms of the franchise make no distinction between fleet and retail sales is plainly false. (Br. at 42.) The sections of the Dealer Agreement that specify how GM will assess dealer sales performance refer specifically and exclusively to retail sales and to the retail sales metric, RSI. In addition, the report that General Motors publishes pursuant to Article 9 of the Dealer Agreement expressly excludes fleet sales from consideration.

2. The Standard for "Unsatisfactory" Sales Performance is Not the Standard for Termination

Folsom Chevrolet contends that "[w]hile the terms of the franchise may state that compliance with sales performance requires an RSI score of 100, the reality is that for a dealer to be deemed "unsatisfactory" *and be subject to termination*, the dealer needs to be below 84.9 RSI and in the bottom 15% of dealers in the state." (Br. at 11 (emphasis added).) However, the italicized portion of that phrase is false. Folsom Chevrolet is conflating the criteria for an "Unsatisfactory" retail sales performance rating and the contractual standards for termination, which are quite different. Tellingly, Folsom Chevrolet's citations following this contention are solely to discussions of an Unsatisfactory rating in a Sales Performance Review; they say nothing about termination. (Br. at 11.)

The Dealer Agreement expressly addresses when General Motors may terminate a dealership for failure to satisfy its sales obligations, and it does not use the standard Folsom Chevrolet has concocted. (*See* R201.017 § 9.) Article 9 states that "Satisfactory performance of Dealer's under Article 5.1 requires Dealer to achieve a Retail Sales Index equal or greater than 100." (*Id.*) The article then states that, "[i]n addition to" the dealership's RSI score, GM "will consider any other relevant factors in deciding whether to" pursue termination (*Id.*) After that consideration, GM may pursue its termination rights "to address any failure by Dealer to adequately perform its sales responsibilities," but only "if General Motors determines that Dealer has *materially breached* its sales performance obligations under this Dealer Agreement." (*Id.* (emphasis added).)

Section 13.2, which governs termination for poor sales performance, likewise does not contain any reference to the bottom 15% of dealers or the "Unsatisfactory" rating in Sales Performance Reviews. (R201.023 § 13.2.) Instead, under Article 9, General Motors looks solely to whether "Dealer has failed to adequately perform its sales or service responsibilities." (*Id.*) If so, GM "will notify Dealer in writing of the nature of Dealer's failure" and provide at least six months "during which Dealer will have the opportunity to correct the failure." (*Id.*) Termination may then follow if "Dealer remains in *material breach* of its obligations at the expiration of the period." (*Id.* (emphasis added).)

Thus, the relevant standard for termination defined by the Dealer Agreement is not whether Folsom Chevrolet ranked in the bottom 15% of dealerships during the cure period. Instead, the standard is whether General Motors determined that Folsom Chevrolet first "materially breached its sales performance obligations," taking into account the dealer's RSI <u>and</u> "other relevant factors," and whether Folsom Chevrolet then "remain[ed] in material breach" following the six-month cure period. The question of whether a material breach has been committed is certainly not limited to, or determined by, situations in which a dealership is in the bottom 15% in the state for sales effectiveness, *i.e.*, RSI.

Mr. Meier, Director of the Western Region for Chevrolet, testified that General Motors found that Folsom Chevrolet materially breached its sales performance obligations, as well as its customer satisfaction obligations. (RT Vol. 4, 27:14-29:1 (Meier).) That determination was based on Folsom Chevrolet's RSI score and "other relevant factors," including a confirmation that the dealership's assigned AGSSA is accurate, the dealership's dismal sales performance utilizing the Sacramento DMA as a benchmark (instead of state average), correspondence relating to the dealership's poor performance, the experiences and opinions of GM personnel in contact with the store such as Mr. Stinson and Mr. Escalante, and the dealership's overall failure to progress during the performance improvement process. (GM PFF ¶¶ 115-117.) The determination that Folsom Chevrolet was in material breach of its contractual sales obligation was not based on a mechanical application of a "bottom 15%" cutoff over a short period of time, but instead took into account the dealership's years of underperformance:

> We also looked at the RSI scores over time and the RSI deficiencies went back to at least 2011, keeping in mind that we did not inform the dealership that they were being put on a quarterly improvement process, contact process until approximately 2014, but the RSI was very, very deficient, not only in terms of the raw index score but also in terms of when you evaluate it in terms of ranking in the State of California, I believe it was of the order of magnitude of fourth from the bottom and -- at that time, and certainly improved a little bit prior to sending the notice of termination letter, but still the actual score itself was well below.

(*Id.*)

Mr. Meier's testimony also underscores the reasons why the termination process does not function as Folsom Chevrolet claims. RSI is not the sole arbiter of performance, and for this reason, it is not "the end of the process," but rather the "first step . . . an indicator that's then confirmed with a deeper dive into what's happening at the operation." (RT Vol. 5, 26:17-27:14 (Farhat).) It is only when that deep dive reveals "substantial nonperformance over a prolonged period of time," as it did here, that GM proceeds to termination. (RT Vol. 5, 28:10-29:2 (Farhat); *see also* RT Vol. 7, 139:22-140:19 (Stockton) (Folsom Chevrolet's expert agreeing that "RSI is a . . . good first step" and a "weathervane" that shows "which dealerships are producing more or less").) Here, Mr. Meier and

General Motors looked at years of sales data, performed additional analyses as a confirmatory check, and consulted the GM representatives most closely involved with the dealership. (GM PFF ¶¶ 115-117.) In other words, the termination decision was not based on an arbitrary cutoff, but on a holistic view of the dealership's performance over a long period of time.

The single criterion described by Folsom Chevrolet, by contrast, would support termination on a purely mechanical "bottom 15%" basis, which is more strict than both the standard set forth in the Dealer Agreement and GM's actual practice.[2] Indeed, Mr. Meier testified that the reason he asked for additional analysis was in the hope it might provide a basis to *avoid* termination: "you look in a serious situation of a termination for anything that you can hang your hat on that would show that there is some . . . issue with the information you've been looking at traditionally." (RT Vol. 4, 99:4-15 (Meier).)

However, after so many years of underperformance despite the sustained coaching and counseling by GM, the "little bit" of improvement the dealership made during the cure period was grossly insufficient to cure its material breach of the Dealer Agreement. (*Id.*) And despite Folsom Chevrolet's protestations to the contrary (Br. at 12), the improvement was in fact quite small. Folsom Chevrolet's RSI of 64.7 during the cure period, if maintained for an entire year, would have improved its ranking in the state by only six spots, from 115th (of 131) to 109th. (R245.046.) This would have placed it in the bottom 16.8% of dealers—a result that does not suggest the dealership's sales performance problems had been fixed, or were even on a path to correction. Indeed, Folsom Chevrolet's performance during full-year 2015, which includes the cure period, was still rated "Unsatisfactory" and in the bottom 15% of California Chevrolet dealerships—just as it was for 2012, 2013, 2014, and 2016. (*See* R242A-E (Sales Performance Reviews) at 2.)

The reality is that, despite Folsom Chevrolet's boasts about the number, an RSI of 64.7 is still a failing grade in and of itself. (*See* R201.017 § 9 ("Satisfactory performance of Dealer's under Article 5.1 requires Dealer to achieve a Retail Sales Index equal or greater than 100.").) The purpose

[2] It is also difficult to imagine that Folsom Chevrolet would have suddenly believed termination to be appropriate if GM had followed the approach it asserts.

of the "cure" period is to give the dealership an opportunity to actually "cure" the deficiency—not marginally lessen it to a still-failing grade.

In sum, the "bottom 15%" criterion described by Folsom Chevrolet is inconsistent with both the terms of the Dealer Agreement and the actual practice of General Motors decision-makers. There is nothing in the record supporting Folsom Chevrolet's contention that General Motors employs a "bottom 15%" cutoff in determining whether a dealer has cured a sales performance breach. (*See, e.g.*, Br. at 12.) General Motors followed the terms of the Dealer Agreement in finding that Folsom Chevrolet's years of underperformance constituted a material breach, and the dealership's very small improvement during the cure period was insufficient to cure that breach. Termination was therefore warranted.

3. Folsom Chevrolet Erroneously Conflates its Customer Satisfaction Obligations with a Test Used During GM Corp.'s Bankruptcy

In addition to the erroneous standard Folsom Chevrolet seeks to impose regarding its sales performance, Folsom Chevrolet asserts that "[w]ith respect to CSI, General Motors also changed the standard that Folsom Chevrolet is held to by the terms of the franchise in order to justify termination." (Br. at 13.) The evidence for this, according to Folsom Chevrolet, is that it "achieved approximately 99% credit on General Motors' own Dealer Performance Score report for CSI." (*Id.*) However, as described below, there is no evidence in the record showing that General Motors uses the Dealer Performance Score report to assess CSI compliance, and it is not referenced in "the terms of the franchise."

Before reviewing this claim, it is worth establishing some context regarding customer satisfaction. First, no specific metric or numeric level of performance is mandated by the Dealer Agreement. Rather, the agreement states generally that the dealer agrees to "ensure that the customer's purchase and delivery experience are satisfactory" (R201.009 § 5.1.1(e)), "maximize customer satisfaction by providing courteous, convenient, prompt, efficient and quality service to owners of Motor Vehicles, regardless of from whom the Vehicles were purchased" (R201.010 § 5.2.1), and "promote customer satisfaction with the purchase and ownership experience." (R201.011 § 5.3.)

However, the Dealer Agreement does provide a method of evaluation of customer satisfaction—comparison to Regional average. Article 5.3 states that "General Motors will provide the dealer with a written report at least annually pursuant to the procedures then in effect evaluating Dealer's purchase and delivery customer satisfaction and Dealer's service customer satisfaction. The report will compare Dealer's performance to other same Line-Make dealers in the Region." (R201.011 § 5.3.)

Customer satisfaction is measured by General Motors with customer surveys. (GM PFF ¶ 196.) Two different surveys are administered: the PDS (Purchase and Delivery Satisfaction) survey assesses a customer's experience during the purchase process for a new vehicle; and the SSS (Service Satisfaction Score) survey assesses a customer's experience when their vehicle undergoes warranty repair or maintenance. (*Id.*) This is comparable to the practices employed by other manufacturers. (GM PFF ¶ 196.) For both PDS and SSS, General Motors provides Folsom Chevrolet with a report which details the results of the survey responses, and assesses the dealership's performance against various composite groups, including the Western Region. (RT Vol. 1, 102:20-106:6 (Stinson).) A summary of this report, titled "CSI Dealer Summary," was admitted as Exhibit R-268.

Marked with a black box in each year's CSI Dealer Summary is the dealership's performance on the "Top Box" question, which asks the customer whether they were "completely satisfied" with their visit. (*See* R268.001.) Notably, this information is provided separately for both sales (PDS) and service (SSS). The Summary then provides the results to several other key questions answered by the customer, again breaking them down separately for both PDS and SSS.

The two surveys ask different questions. For example, "Q13" in the PDS survey relates to "Overall Financial Process," while in the SSS survey it asks about "Fixed Right This Visit." (*Id.*) Nowhere in these results are the PDS and SSS scores summed together—each measure stands alone. (*See* RT Vol. 1, 102:20-104:2 (Stinson) ("both of those measures" are "important to GM and the dealer.").)

General Motors representatives testified consistently that customer satisfaction during the purchasing experience, as measured by PDS, has a direct impact on a dealership's ability to both attract and retain retail customers. (GM PFF ¶ 198.) Not coincidentally given its low sales rate, Folsom Chevrolet struggled on the PDS metric in particular, scoring below the Region average every year from 2012 to 2017. (GM PFF ¶ 197.) This isn't normal; Mr. Meier referred to the dealership's performance as a "severe" and "sustained" deficiency. (RT Vol. 4, 27:14-29:1 (Meier).) The poor purchasing experience felt by customers during this time is also reflected in and corroborated by dealer customer loyalty reports, which rated Folsom Chevrolet below the District, Zone, Region, and Nation every month for over three years. (GM PFF ¶ 199.) However, Folsom Chevrolet generally performed better on the SSS metric, albeit with the glaring exception of 2014, when the dealership received an extremely poor score.[3] (GM PFF ¶ 197.)

Yet rather than grapple with the fact of their underperformance as assessed by PDS, Folsom Chevrolet has attempted to blur the lines by introducing a report used during GM Corporation's 2009 bankruptcy. That report, called the Dealership Performance Summary ("DPS"), summarizes overall dealer performance by combining performance data for four separate aspects of dealership performance: sales performance (by RSI), customer satisfaction (by combining PDS and SSS), working capital, and profitability. (*See* P185.068.) Folsom Chevrolet prefers the DPS report over the CSI Dealer Summary because the DPS report lumps the dealership's PDS and SSS scores into a single number, meaning its PDS deficiencies can be hidden by better results on the SSS survey. (*See* P185.068.)

However, the DPS report does not "compare Dealer's performance to other same Line-Make dealers in the Region" as required by Article 5.3. (R201.011 § 5.3.) The customer satisfaction component of the Dealer Performance Summary score is therefore clearly not the report, or standard, referenced under Article 5.3.

Furthermore, no evidence supports the notion that General Motors uses the combined CSI numbers in the DPS report to assess customer satisfaction with the purchase or service experiences. Rather, the only evidence in the record regarding the DPS report shows that it was used by a

[3] Analysis of Folsom Chevrolet's CSI results for 2014 are conspicuously absent from Mr. Stockton's report and Folsom Chevrolet's Opening Brief.

nonparty—Old GM—in the bankruptcy process, to meet the requirements of a federal statute which Mr. Stockton testified and agreed is "quite a bit different" from the California "good cause" standard. (RT Vol. 7, 173:1-12 (Stockton).) Mr. Stockton admitted he doesn't know if General Motors "uses the DPS report for terminations currently." (RT Vol. 7, 171:19-21 (Stockton).) The only evidence Mr. Stockton pointed to was that "GM makes [DPS reports] available" on its website, but even then, it appears the report is somewhat hidden. (RT Vol. 7, 106:10-15 (Stockton) ("[s]ome dealers find them hard to locate").)

In other words, the claim that GM has changed its standard for CSI is fabricated. In actuality, Folsom Chevrolet is attempting to introduce an inapplicable and alternative measure of performance, based solely on the fact that the report can still be found (but not easily, per the dealership's expert) on a GM website. That the report was used by a non-party, during a highly unique bankruptcy proceeding nearly ten years ago, simply goes unmentioned by Folsom Chevrolet. Furthermore, the reason for pushing this standard is not that it is required (or even mentioned) by the Dealer Agreement, or because it somehow has greater statistical validity,[4] but because it happens to combine the dealership's numbers for both PDS and SSS into a single value. And yet—even using this alternative measure it suggests, Folsom Chevrolet *still* demonstrates customer satisfaction consistently below the Region average. (Br. at 13.)

General Motors does not deny that the dealership has performed better in SSS than in PDS, but no evidence supports the claim that the best measure of customer satisfaction is to combine these scores, rather than looking at them separately. (*See* RT Vol. 1, 102:20-104:2 (Stinson) ("both of those measures" are "important to GM and the dealer").) To the contrary, the fact that the

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[4] It is worth noting that even though Folsom Chevrolet repeatedly attacks GM's CSI surveys as lacking validity (*see* Br. at 45), it relies on those same surveys completely in arguing that the DPS reports show it met its customer satisfaction requirements. Indeed, evidence in the record shows that Folsom Chevrolet relies on the CSI reports in operating its business. For example, Folsom Chevrolet used its CSI reports to determine whether salespeople were achieving effective customer satisfaction. (RT Vol. 8, 39:21-40:3 (L. Crossan).) In fact, Folsom Chevrolet employees would go over the reports daily. (RT Vol. 8, 96:1-12 (L. Crossan).) And in all that time, according to Larry Crossan, the former General Manager, they never had "any concerns about the data or the reliability of the data." (*Id.*)

dealership's customers have had bad experiences when purchasing vehicles seems highly relevant to this good cause hearing, which has primarily focused on why Folsom Chevrolet's new vehicle sales are so poor. Positive customer interactions during service events like an oil change are, of course, helpful, but they do not cover up all the dealership's flaws with the purchase and delivery experience. Folsom Chevrolet was, and is, in breach of its customer satisfaction obligations.

4. Folsom Chevrolet's Attacks on GM's Expert Misrepresent the Record

In an effort to bolster its misguided attempt to rely upon the DPS report as evidence of acceptable customer satisfaction, Folsom Chevrolet makes a misleading attack on General Motors expert, Mr. Sharif Farhat. Specifically, Folsom Chevrolet states:

> General Motors' expert testified during the hearing that while he testified in deposition that Folsom Chevrolet's slight deviation from average CSI was not sufficient to justify termination, he could no longer testify to that effect for Folsom Chevrolet because he "doesn't know specifically with regard to Folsom Chevrolet." [RT Vol.5:184:15-185:12.] Essentially, with respect to CSI, General Motors did not inform its expert before his deposition that the standard it was applying to Folsom Chevrolet for CSI performance was not the norm the was [*sic*] accustomed to. By the time of the hearing General Motors had informed its expert of the shifting standard.

(Br. at 13.)

Folsom Chevrolet's claim that Mr. Farhat altered his testimony is simply false, and its citation does not support it. The cited section of transcript reads, in its entirety:

> Q. If you were to leave aside the dealer having any issues with its sales performance, would its CSI performance, in your view, warrant termination?
> MR. CLOUATRE: Objection. Incomplete hypothetical. And relevance.
> ADMINISTRATIVE LAW JUDGE: Overruled.
> THE WITNESS: Okay. So you asked me this in my deposition. In my experience, I haven't seen that, or maybe one occasion where it was CSI, but I don't know specifically with regard to Folsom Chevrolet. I couldn't tell you if it warrants termination.
>
> BY MR. RASMUSSEN:
> Q. You didn't think so at the time of your depo, did you?
> A. Yeah, in my experience, it's not an event I've seen. Perhaps a dealer in one state over the last 30 years that was a CSI-based issue, but that's not common.
> But again, as was testified, this is a further indicator of the effectiveness of the operation. To the extent there's operational deficiencies, CSI helps say, hey, you know, it's not -- it's not unusual that the CSI is low when its sales are so low.

(RT Vol. 5, 184:15-185:12 (Farhat).)

Folsom Chevrolet claims that in this passage, Mr. Farhat "testified . . . that while he testified in deposition that Folsom Chevrolet's slight deviation from average CSI was not sufficient to justify termination, he could no longer testify to that effect for Folsom Chevrolet." (Br. at 13.) It is difficult to reconcile this claim with the actual testimony from the transcript above, which contains none of the asserted points—or even a clear indication of what the change in testimony is alleged to be. Certainly, Folsom Chevrolet's counsel did not impeach Mr. Farhat's testimony on this point at the hearing.

Yet Folsom Chevrolet then doubles down by arguing, without evidence or even citation, that "General Motors did not inform its expert before his deposition that the standard it was applying to Folsom Chevrolet for CSI performance was not the norm," but then "[b]y the time of the hearing General Motors had informed its expert of the shifting standard." (Br. at 13.) This is more fabrication. The accusation does not even make sense, because as detailed above, General Motors did not change its approach to assessing CSI performance. Rather, Folsom Chevrolet simply found a report from the bankruptcy era that it likes and presented it as though it applied equally today. General Motors does not actually assess CSI performance using the standard Folsom Chevrolet relies upon, and so it would have no need to inform Mr. Farhat the standard had "shift[ed]."

Folsom Chevrolet's attacks against Mr. Farhat are thus completely without substance, and not supported in the slightest by the citation provided. The entire line of argument is wishful thinking at best—a poor foundation on which to make false accusations and personal attacks. The hollowness of this attack, which is unfortunately not an isolated occurrence, underscores just how unsupported many of Folsom Chevrolet's assertions of fact turn out to be.

5. RSI and CSI Scores Were Not the Sole Bases for Termination

Folsom Chevrolet argues that the only bases for termination General Motors identified in the Notice of Termination were (1) a failure to achieve 100 RSI; and (2) a failure to reach regional average CSI scores. (Br. at 41.) However, this is not accurate, because although the Notice of Termination does mention these scores, its scope is not that narrow. (R238.002.) In particular, it specifically states that GM considered other information beyond just RSI scores when evaluating sales performance:

> Pursuant to Article 9 of the Dealer Agreement, GM has considered other information that may be relevant to an evaluation of Dealer's performance under Article 5.1.1 of the. Dealer Agreement, including the overall sales of Chevrolet vehicles in Dealer's Area of Geographic Sales and Service Advantage, Dealer's sales performance as compared to other Chevrolet dealers in Dealer's local market area, the geographic area assigned to Dealer under Article 4.2 of the Dealer Agreement, as well as other issues raised by Dealer.

(*Id.*)

As discussed above, this statement is corroborated by Mr. Meier's testimony that the termination decision included other information than just RSI, including a confirmation that the dealership's assigned AGSSA is accurate, the lack of a difference on the dealership's dismal performance from utilizing the Sacramento DMA as a benchmark instead of state average, correspondence relating to the dealership's poor performance, the experiences and opinions of GM personnel in contact with the store, and the dealership's overall failure to progress during the performance improvement process. (GM PFF ¶¶ 115-117.)

This is consistent with Mr. Farhat's testimony that the termination process involves "a long period of consultation, working with the dealer, trying to understand what the issues are . . . it's certainly not your RSI is X, you're terminated." (RT Vol. 5, 27:15-28:9 (Farhat); *see also* RT Vol. 5, 28:21-29:2 (Farhat) ("[T]his is not a quick decision that's made based on one statistic.").) As a result, it is not accurate to claim that the only basis for termination was RSI and CSI scores.

6. General Motors did Not Violate the Dealer Agreement by Terminating Folsom Chevrolet

The final invention that bears mention is Folsom Chevrolet's argument, repeated often, that it was actually *General Motors* that violated the Dealer Agreement through its Notice of Termination. (*See, e.g.*, Br. at 12-13.) This argument is premised upon the inaccurate claims, discussed in subsections 2-3 *supra*, that General Motors changed its standards in order to justify termination. (*See* Br. at 12 ("General Motors changed what it required of Folsom Chevrolet with respect to RSI in order to justify Folsom Chevrolet's termination, and thereby breached the terms of the franchise."), 13 ("As it did with RSI, General Motors changed the standard that Folsom Chevrolet was held to with respect to CSI in order to justify Folsom Chevrolet's termination, and thereby breached the terms of the franchise.").)

As shown above, the "change" to these standards is purely illusory, based entirely on Folsom Chevrolet's conflation of various other standards with the actual performance assessments made by General Motors. Indeed, Folsom Chevrolet fails to identify a single provision of the Dealer Agreement that it claims General Motors actually breached. That is an important—and revealing—omission. As with the attack against Mr. Farhat, Folsom Chevrolet's assertion of breach is simply empty rhetoric, an accusation made to muddy the waters and obscure any delineation of proper conduct.

The reality is that General Motors provided Folsom Chevrolet with frequent, transparent, data-rich reports detailing the dealership's retail sales and customer satisfaction performance. (*See* R242A-F (2012-Mar. 2017 Sales Performance Reviews); R268 (2012-Jan. 2017 CSI Summary Report).) Folsom Chevrolet was also made well aware of its obligations through quarterly contact meetings with Mr. Stinson, numerous letters, and 200+ counseling visits from GM District Manager Mr. Saul Escalante. (GM PFF ¶¶ 69-70, 73, 101-102.) Even after the cure period ended, General Motors twice provided Folsom Chevrolet with additional time to improve, but the dealership failed to do so. (GM PFF ¶ 107.) Given Folsom Chevrolet's material breaches of its obligations under the Dealer Agreement, General Motors was well within its rights to proceed to termination.

II. GENERAL MOTORS ESTABLISHED THAT RSI IS A REASONABLE METRIC AND PERMISSIBLE UNDER THE VEHICLE CODE

There is no dispute in this matter regarding the absolute number of retail sales made by Folsom Chevrolet, or General Motors' calculation of the dealership's RSI score. Rather, the main thrust of Folsom Chevrolet's briefing is whether measuring sales performance by RSI is reasonable under Vehicle Code Section 11713.13(g). (Br. at 13-24.) That Section states, in relevant part:

> [It is unlawful to] [e]stablish or maintain a performance standard, sales objective, or program for measuring a dealer's sales, service, or customer service performance that may materially affect the dealer . . . unless both of the following requirements are satisfied:
>
> (A) The performance standard, sales objective, or program for measuring a dealer's sales, service, or customer service performance is

> reasonable in light of all the existing circumstances, including, but not limited to, the following:
>
> i. Demographics in the dealer's area of responsibility.
>
> ii. Geographical and market characteristics in the dealer's area of responsibility.
>
> iii. The availability and allocation of vehicles and parts inventory.
>
> iv. Local and statewide economic circumstances.
>
> v. Historical sales, service, and customer service performance of the line-make within the dealer's area of responsibility, including vehicle brand preferences of customers in the dealers area of responsibility.
>
> (B) Within 30 days after a request by the dealer, the manufacturer, manufacturer branch, distributor, distributor branch, or affiliate provides a written summary of the methodology and data used in establishing the performance standard, sales objective, or program for measuring dealership sales or service performance. The summary shall be in detail sufficient to permit the dealer to determine how the standard was established and applied to the dealer.

Cal. Veh. Code § 11713.13(g)(1) (emphasis added).

General Motors agrees with Folsom Chevrolet that Section 11713.13(g)(1) is applicable to RSI.[5] (Br. at 14.) However, it disagrees that RSI is an unreasonable metric. The evidence in the record established conclusively that the use of RSI is reasonable in light of all the existing circumstances.

A. Legal Standard

Vehicle Code Section 11713.13(g) forbids the use of a performance standard that is not "reasonable in light of all the existing circumstances, including, but not limited to," five enumerated factors. Cal. Veh. Code § 11713.13(g). But although Folsom Chevrolet makes various criticisms of RSI, it does not address the language of the statute itself. In particular, it does not set forth any

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[5] Folsom Chevrolet makes only a passing reference to the possibility that Section 11713.13(g) is applicable to GM's CSI metrics, and so GM has not addressed that issue in reply. However, it is GM's position that its CSI metrics are reasonable within the meaning of the statute. (*See* GM PFF ¶¶ 327-330.) Notably, GM's usage of CSI has already been held reasonable by a California federal court. *See In re Claremont Acquisition Corp., Inc.*, 186 B.R. 977, 987 (C.D. Cal. 1995), *aff'd*, 113 F.3d 1029 (9th Cir. 1997).

explanation of when a performance standard is "reasonable in light of all the existing circumstances." *Id.*

General Motors is not aware of any published case law interpreting Section 11713.13(g) specifically. However, reasonableness as a standard has been described many times, in many different contexts. Black's Law Dictionary describes "reasonable" as "[f]air, proper, or moderate under the circumstances; sensible." *Reasonable*, Black's Law Dictionary (10th ed. 2014). The Restatement (Second) of Torts notes that a "reasonable" person acts with "ordinary prudence," or "average prudence," or with "ordinary care." Restatement (Second) of Torts § 283 (1965). Similarly, "reasonable" care is "the degree of care that a prudent and competent person engaged in the same line of business or endeavor would exercise under similar circumstances." *Care*, Black's Law Dictionary (10th ed. 2014).

Importantly, "[t]o be reasonable is not to be perfect . . . ." *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014). Thus, in the Fourth Amendment context, law enforcement officers are given "fair leeway" to enact searches and seizures based on "reasonable" suspicion, even if they are later found to have committed a mistake of fact or law. *Id.* In the context of substantive due process, a "reasonable" relationship between a governmental interest and a restriction "does not require an 'exact fit,'" but instead, the "only question . . . is whether the [official's] judgment was 'rational.'" *Valdez v. Rosenbaum*, 302 F.3d 1039, 1046 (9th Cir. 2002).

From these disparate standards, some elements of what makes a performance standard "reasonable" can be ascertained. The standard must be generally "fair," but with "leeway" given to decision makers, including for mistakes. The standard must generally be a "rational" approach to measuring performance, but it does not have to go to extreme lengths to be an "exact fit." It is significant if "a prudent and competent person engaged in the same line of business or endeavor" utilizes a similar approach. And importantly, it does not need to be "perfect."

These criteria generally fit with a line of decisions involving the dealer/manufacturer relationship in a different context. In *In re Van Ness Auto Plaza, Inc.*, the bankruptcy court laid out a standard for reasonableness with respect to Vehicle Code Section 11713.3, which prohibits an auto manufacturer's unreasonable withholding of consent to assign a franchise:

> I conclude that withholding of consent to an assignment of an automobile franchise is reasonable . . . if it supported by substantial evidence showing that the proposed assignee is materially deficient with respect to one or more appropriate, performance-related criteria. This test is more exacting than whether the manufacturer subjectively made the decision in good faith after considering appropriate criteria. It is an objective test that requires the decision to be supported by evidence. The test is less exacting than one which requires that the manufacturer demonstrate by the preponderance of the evidence that the proposed assignee is deficient. 120 B.R. 545, 549 (Bankr.N.D. Cal. 1990).

The *Van Ness* standard has since been echoed by both state and federal courts in California. *See In re Claremont Acquisition Corp., Inc.*, 186 B.R. 977, 987 (C.D. Cal. 1995), *aff'd*, 113 F.3d 1029 (9th Cir. 1997) (applying the *Van Ness* standard and holding that GM's use of a customer satisfaction performance index (CSI) was substantial evidence to support the reasonableness of the decision); *Fladboe v. American Isuzu Motors, Inc.*, 150 Cal. App. 4th 42, 62-64 (2007), *as modified* (Apr. 24, 2007) (applying the *Van Ness* standard and holding that Isuzu had provided substantial evidence as to the reasonableness of its decision to withhold consent to assign).

General Motors therefore submits that RSI is "reasonable" under Section 11713.13(g) if there is "substantial evidence" supporting its reasonableness. As *Van Ness* states, this is a "less exacting" standard than proof of deficiency by a preponderance of the evidence. Thus, the question is not whether a better or more perfect standard could be created, given infinite time and resources, but whether substantial evidence supports the reasonableness of the standard already in use.

Here, the Legislature has provided five criteria the Section states must be considered in determining reasonableness of a performance standard:

i. Demographics in the dealer's area of responsibility.

ii. Geographical and market characteristics in the dealer's area of responsibility.

iii. The availability and allocation of vehicles and parts inventory.

iv. Local and statewide economic circumstances.

v. Historical sales, service, and customer service performance of the line-make within the dealer's area of responsibility, including vehicle brand preferences of customers in the dealers area of responsibility.

Cal. Veh. Code § 11713.13(g)(1)(A). The evidence at the hearing showed that RSI takes into account each of these five factors and is supported by substantial evidence. As a result, it is a reasonable metric, and Section 11713.13(g) does not proscribe its use.

B. <u>The RSI Calculation</u>

Folsom Chevrolet provides a detailed breakdown of the RSI calculation. (Br. at 14-16.) However, because Folsom Chevrolet cites exclusively to testimony from Mr. Stockton, not GM witnesses, the breakdown is not entirely accurate. Some of the dealership's errors are trivial—AGSSA is "Area of <u>Geographic</u> Sales and Service Advantage," not "<u>Greatest</u>" (*see* Br. at 14; RT Vol. 3, 135:9-136:5 (Giguere)—but others misstate the actual RSI methodology. For example, Folsom Chevrolet's brief suggests GM calculates market share and expectations at the market segment level. (*See* Br. at 14 ("General Motors ascertains what its market share in California is for each market segment.").) However, market share and expected sales are calculated for each Chevrolet model line within each market segment. (*See, e.g.*, R242A.004 (showing market share within the segment for all Chevrolet car lines).)

GM therefore reproduces the RSI calculation here as follows:

1. The RSI formula involves taking a dealership's actual number of retail sales during a relevant period of time, such as a year, and dividing that number by the number of sales necessary to equal state average market in share in Folsom Chevrolet's assigned AGSSA ("expected sales"). (*See* RT Vol. 2, 471:18-24 (Giguere).) The result is then multiplied by 100, so an RSI of 100 means state-average performance. (*Id.*)

2. The numerator, retail sales, is simply the dealership's actual number of sales to individual consumers or to small businesses (commercial entities that do not qualify for a Fleet Account Number) during the relevant period of time. (GM PFF ¶¶ 136-138.) GM's Sales Performance Reviews note that "vehicles sold to and registered by national fleet accounts for GM are excluded from this analysis." (*See, e.g.*, R242A (2012 SPR) at 1, 4, 6.)

3. The denominator, expected sales, involves a five-step calculation:

    a. First, for each vehicle line the dealer is expected to sell, determine what market segment that vehicle line is in. (RT Vol. 2, 465:21-466:23 (Giguere).)

        i. For example, the Silverado 1500 Crew Cab is in the Large Pickup-Crew Cab segment. (R242A.006.)

    b. Second, count the total number of registrations within the dealer's AGSSA for that segment, across all manufacturers. (RT Vol. 2, 468:7-22 (Giguere).)

        i. For example, there were 666 Large Pickup-Crew Cab vehicles registered within Folsom Chevrolet's AGSSA in 2012. (*Id.*; R242A.006.)

c. Third, determine Chevrolet's market share for that vehicle line within that segment, across the entire state. (RT Vol. 2, 468:23-469:4 (Giguere).)

   i. For example, Silverado 1500 Crew comprised 15.76% of all Large Pickup-Crew Cab vehicles purchased in California in 2012. (*Id.*; R42A.006.)

d. Fourth, multiply the AGSSA registrations for that segment (from step two) by the state-average market share for that vehicle line within that segment (step three) to determine how many units of that vehicle a state-average dealer would sell in that area, during the relevant period of time. (RT Vol. 2, 469:5-470:3 (Giguere).)

   i. For example, for Silverado 1500 Crew in 2012, multiplying the 666 registrations from step two by the 15.76% state average market share from step three yields a result of 105 units. That means Folsom Chevrolet would need to sell 105 of those vehicles to achieve state average market share in its area. (*Id.*; R242A.006.)

e. Fifth, repeat the first four steps for each vehicle line the dealer is expected to sell, and sum the results. (R242A.006.) That total is the dealership's expected sales for the relevant period of time. (RT Vol. 5, 51:16-52:9 (Farhat).)

4. Thus, for 2012, the dealership was expected to sell 461 trucks (R242A.006, column (k)) and 326 cars (R242A.004, column (k)) in order to meet state average market share, for a total of 787 sales. (R242A.002.) However, it only made 373 retail sales. (*Id.*) To calculate the dealership's RSI for 2012, 373 is divided by 787 and multiplied by 100, yielding a score of 47.40, or approximately 47% of state average performance. (*Id.*)

C. <u>RSI is Supported by Substantial Evidence</u>

The fundamental premise of RSI, and the reason it is used over something like raw sales volume, is that dealers in larger markets (*i.e.*, those with more vehicle registrations) generally have more opportunity to sell than dealers in smaller markets. (GM PFF ¶ 283.) For this reason, it would be unfair to evaluate all dealers as though they had an equal opportunity to make a particular number of sales. (*Id.*) By considering the opportunity available to the dealer, RSI avoids treating smaller dealers unfairly.

Substantial evidence, as well as common sense, supports the assertion that sales and opportunity should increase in tandem. Mr. Farhat's analysis shows that California dealers' retail sales volume correlates to their expected sales, meaning that as measured opportunity goes up, so do retail sales. (GM PFF ¶ 284.) The correlation has an R^2 value of .5363, which means that opportunity as measured by expected sales accounts for over half of the variance seen in dealership sales. (*Id.*) Other inputs into dealership performance, such as inventory, pricing, effort, *etc.*, account for the remaining difference. (RT Vol. 5, 23:12-26:16 (Farhat).) Mr. Farhat testified that he's done the opportunity vs. sales analysis "hundreds of times," and it holds up all over the world: "This relationship holds for Porsche dealers in the United States. It holds for Mercedes dealers in Germany. It's a fundamental premise that large markets offer more opportunity, and those dealers sell more." (GM PFF ¶ 284.)

Folsom Chevrolet argues that Mr. Farhat's analysis shows that RSI is flawed, because the provided "correlation between sales and opportunity is .8073," and not 1. (Br. at 33.) In layman's terms, the criticism is that the slope of the "best fit" line drawn by Mr. Farhat on the chart of expected vs. actual sales rises not at a 1 to 1 level, but at approximately 1 to 0.8. (*See* R244.022.) But as can be seen on the chart, and as Mr. Stockton admitted, this specific regression line does not start at zero, but at about 205.[6] (*Id.*; RT Vol. 7, 131:8-25 (Stockton).) It would therefore make little sense for the slope of the line to be 1; that would imply that all dealerships have a starting expectation of 205 units, which is not accurate. The only way for this criticism to be fair would be to measure the slope of the best fit line that *starts at the 0 position*, a test Mr. Stockton admitted that he chose not to perform. (RT Vol. 7, 132:10-16 (Stockton).)

In addition, the basic methodology of measuring sales against expectations is "fundamental" to the auto industry. (GM PFF ¶ 276.) General Motors has been utilizing RSI since the late 1970s, but the "same process" is used by all major vehicle manufacturers, including Chrysler, Ford, Toyota, Honda, and Nissan. (GM PFF ¶¶ 275-276.) The fact that all of General Motors' competitors—the "prudent and competent person[s] engaged in the same line of business"—use a similar system to RSI is substantial evidence in support of its reasonableness. *Care*, Black's Law Dictionary (10th ed. 2014).

Indeed, neither Folsom Chevrolet nor its expert, Mr. Stockton, has proposed any reliable alternative measurement of sales performance. This is further evidence of RSI's reasonableness. To

[6] The regression equation is $y=0.8073x + 205.23$, where Y is actual sales, while X is expected sales. (R244.022.) Zeroing out X (*i.e.*, starting at the far left side of the graph) results in Y = 205. (RT Vol. 7, 131:8-25 (Stockton).)

that end, when Mr. Stockton designed his TSI metric, he used the basic RSI methodology as his framework. (RT Vol. 5, 90:3-9 (Farhat).) It would not be reasonable to allow Folsom Chevrolet to critique RSI on the one hand, while touting an alternative standard that replicates the exact RSI methodology on the other hand.

Other reasonable features of RSI are that the calculation is transparent, conservative, and objective. (*See* GM PFF ¶¶ 277-278.) In particular, it is based on actual sales data, not projections. (GM PFF ¶ 277.) Furthermore, GM supplies each dealer, including Folsom Chevrolet, with detailed Sales Performance Reviews that explain precisely how sales and expectations are calculated. (R-242A-E.) Thus, the second prong of Section 11713.13(g)—that the manufacturer "provides a written summary of the methodology and data used in establishing the performance standard . . . in detail sufficient to permit the dealer to determine how the standard was established and applied to the dealer" is easily met.

Another useful aspect of RSI is that the calculation automatically adjust for many common issues. Because it is based on actual registrations made by actual consumers, the RSI calculation takes into account many factors that affect local markets, such as economic conditions and population changes. (GM PFF ¶ 279.) If nobody in an area purchases a vehicle, the RSI calculation would pick up on that, and Folsom Chevrolet's expected sales for that area would be zero. (*Id.*) Similarly, if gas prices decrease and Folsom residents start buying fewer sedans and more pickup trucks and large SUVs—segments in which Chevrolet does well—RSI would automatically adjust Folsom Chevrolet's sales expectations upwards through the segmentation process. (GM PFF ¶¶ 280-81.) Likewise, if gas prices rise and the market shifts in the other direction, RSI would automatically adjust Folsom Chevrolet's sales expectations downwards accordingly. (*Id.*)

In addition, because it is only calculated after the fact, not as a projection, RSI takes into account changes in market share as they happen. (GM PFF ¶ 281.) For example, Folsom Chevrolet argues that Chevrolet vehicles have become more difficult to sell, because other manufacturers have introduced competing vehicles, pricing has "dramatically increased," and "many people . . . took offense to the fact that General Motors had filed for bankruptcy." (Br. at 7.) But even assuming *arguendo* such claims are valid, they would not have affected Folsom Chevrolet's RSI. Changes in consumer preferences, including defection to other brands, are immediately reflected in the statewide market share numbers that determine the dealership's sales expectations. (GM PFF ¶¶ 280-281.) Indeed, even temporary changes to market share—like an electric car maker rocketing into high popularity before flaming out—are adjusted for, because the market share is empirically determined for each relevant period of time. (*Id.*)

There are additional benefits to RSI, including its comparative nature and its ability to take into account local conditions and consumer preferences, including economic factors, household income, and vehicle type preferences. (GM PFF ¶¶ 279-282.) These benefits will be explored in greater detail in the following sections.

D. <u>RSI is Reasonable in Light of the Enumerated Factors in Section 11713.13(g)(1)</u>

1. RSI is Reasonable in Light of Demographics in Folsom Chevrolet's Area of Responsibility (Cal. Veh. Code § 11713.13(g)(1)(A)(i))

The first factor to be considered under Section 11713.13(g)(1) is whether RSI is reasonable in light of "[d]emographics in the dealer's area of responsibility." Cal. Veh. Code § 11713.13(g)(1)(A)(i). On this factor, the evidence in the record supports RSI's reasonableness because Folsom Chevrolet generally faces favorable conditions in terms of demographics. (GM PFF ¶ 286.) It is located in a fast-growing, wealthy area; the population of Folsom grew 39% from 2000 to 2010. (GM PFF ¶ 287.) The average household income in Folsom is over $100,000, which is higher than state average. (*Id.*) And new businesses continue to relocate to the area, including tech companies. (*Id.*) As a result, Folsom Chevrolet's closest competitors, Ford and Chrysler, perform very well from the same location, despite selling to the same demographic group as Folsom Chevrolet. (GM PFF ¶ 288.) In 2013, these competitors outsold Folsom Chevrolet by three to four times on a volume basis. (*Id.*)

Thus, this is not an area where it is impossible to sell cars and trucks. However, Folsom Chevrolet's expert, Mr. Stockton, claims to have found demographic variables that statistically correlate with Chevrolet registrations in the "5 County Area" around Sacramento. (P185 at 49, Tab 5 page 2.) But upon closer inspection, there are many issues with Mr. Stockton's analysis. (*See* GM PFF ¶¶ 303-326.) Foremost among these is the fact that the adjustments made by demographics in

Mr. Stockton's "demographic model" have almost no effect on Folsom Chevrolet's sales expectations themselves. The actual adjustments occur almost entirely as the result of his use of the arbitrary "5 County Area." (GM PFF ¶¶ 308, 316.)

Before diving in, it is worth noting that Mr. Stockton found that there were four demographic variables that were significantly correlated with Chevrolet registrations for the state of California as a whole: Median Age, Median Household Income, % of Population with a Degree, and Population Density. (P185 at 50, Tab 5 page 3.) However, only two of these variables—age and % degree—were found to still be statistically significant within the "5 County Area." (P185 at 133, App. 65; RT Vol. 10, 84:20-85:18 (Farhat).) Mr. Stockton claimed that this is because the Sacramento "area demographically is more similar to each other . . . [these variables are] not causing, within the five county area, market share variation." (RT Vol. 7, 36:17-38:11 (Stockton).) Yet this makes little sense, because median income and population density vary significantly across the 5 County Area dealers. (R246.021.) For example, the population density in Winner Chevrolet's area, centered on Colfax, is a mere 2% of that of Performance Chevrolet, based in Sacramento. (*Id.*) Meanwhile, the median income of consumers in Folsom Chevrolet's area is approximately 62% higher than for Kuni. (*Id.*)

Mr. Stockton also attempted to explain the lack of significance of the other variables by claiming that "those counties are different from the state. So in other words, the factors that are -- that correlate with Chevrolet market share elsewhere statewide are different. They're having a different affect than what they are having in the area including Folsom." (RT Vol. 7, 34:9-15 (Stockton).) But the fact that two variables were significant across one geographic area but not another, raises serious questions about the reliability of these adjustments.[7] After all, as Mr. Stockton stated—and Folsom Chevrolet quoted—"[t]he test of statistics and of statistical significance is

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[7] As a result, it is not clear whether Mr. Stockton believes GM should take those variables into account in any fashion. Even Folsom Chevrolet seems confused, as they claim Mr. Stockton's 5 County model controls for "demographic variables of age, income, education level, and population density." (Br. at 21.) To be clear, however, Mr. Stockton's 5 County model does <u>not</u> consider income and population density. (Br. at 21; P185 at 49, Tab 5 page 2; RT Vol. 7, 37:18-38:11 (Stockton); RT Vol. 10, 84:10-85:18 (Farhat).)

whether that correlation is consistent enough and essentially overwhelms noise and counterexamples regularly enough that the balance of evidence favors that this variable is making a difference." (Br. at 20; RT Vol. 7, 74:17-22 (Stockton).) However, there was no evidence that these variables correlate "consistent[ly] enough" or "overwhelm[] noise and counterexamples regularly enough" that they actually make a difference. Indeed, Mr. Stockton admitted that he has used different demographic variables in his other cases than the ones he advocates using here, undercutting any notion that the variables selected here have any inherent reliability for this analysis. (GM PFF ¶ 312.)

Meanwhile, a wealth of counter-examples demonstrate that Mr. Stockton's demographic adjustments really are just noise. For example, the closest match to Folsom Chevrolet in the 5 County Area, using the demographics selected by Mr. Stockton, is John L. Sullivan Chevrolet. (GM PFF ¶ 314.) Specifically, on the two variables Mr. Stockton found significant within the 5 County Area—Median Age and % Degree—the two dealerships face nearly identical customer bodies. (R246.021.) With respect to median age, the group of 9 dealers as a whole spans from 27.0 to 51.5, but Folsom Chevrolet at 42.3 and John L. Sullivan at 40.5 are extremely close. (*Id.*) Similarly, the % degree spans from a low of 21.1 to a high of 69.2, but Folsom Chevrolet at 36.4 and John L. Sullivan at 35.2 are nearly identical. (*Id.*) The median income is also very close, with a slight edge to Folsom Chevrolet, which actually has the highest median income in the area. (*Id.*)

Thus, the demographics between the two dealerships are similar, as were the overall sales expectations for 2015: 1,142 vehicles for Folsom Chevrolet and 1,230 vehicles for John L. Sullivan. (*Id.*) The results, however, were quite different. Folsom Chevrolet sold 652 vehicles in 2015, while John L. Sullivan sold *1,766*. (*Id.*) In other words, despite facing nearly identical demographic profiles, John L. Sullivan was able to outsell Folsom Chevrolet by nearly three times.

Another example of the lack of effect from demographics is Woodland Chevrolet in Woodland, California, which is similarly within the 5 County Area. (*Id.*) Over several years, Woodland Chevrolet was able to raise its sales significantly—from an RSI of 89.8 to 142.4—even though the demographics of the surrounding population remained the same. (R244.085; RT Vol. 5, 107:3-110:6 (Farhat).) As Mr. Farhat explained, "[i]f Mr. Stockton's premise of being in these counties and demographics controlling how well a dealer can do [were true], we wouldn't see these increases. We'd see, regardless of what the dealer did, you'd get a flat level of performance. And that's not what you see." (*Id.*)

As a final check, Mr. Farhat isolated each of the four variables originally considered by Mr. Stockton and analyzed whether it seemed to affect sales.[8] (R246.017-20.) However, the dealers most similar to Folsom Chevrolet in each demographic variable are doing fine, as measured by RSI. (*Id.*; RT Vol. 5, 101:9-105:12 (Farhat).) Notably, for % degree, the ten most similar dealers had an RSI of 101.3, while those most similar by median age had an RSI of 105.3. (R246.017, 019.)

Accordingly, the evidence at the hearing established that the demographic makeup of the consumers in Folsom Chevrolet's area is not causing the dealership unreasonable difficulty in meeting RSI. In particular, the fact that John L. Sullivan's demographics are so similar to Folsom Chevrolet, while its sales are so much higher, provides strong evidence that Folsom Chevrolet's demographics are not causing poor sales. Substantial evidence thus supports RSI's reasonableness in light of demographics.

2. RSI is Reasonable in Light of Geographical and Market Characteristics in Folsom Chevrolet's Area of Responsibility (Cal. Veh. Code § 11713.13(g)(1)(A)(ii))

The second factor to be considered under Section 11713.13(g)(1) is whether RSI is reasonable in light of "[g]eographical and market characteristics in the dealer's area of responsibility." Cal. Veh. Code § 11713.13(g)(1)(A)(ii). The evidence for this factor also supports RSI. The geography for Folsom Chevrolet is reasonably assigned, and the market characteristics of its AGSSA are good for selling Chevrolet vehicles.

a. <u>RSI is Reasonable in Light of the Geographical Characteristics of</u>

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[8] Folsom Chevrolet called this analysis "simplistic at best, and intellectually dishonest at worst." (Br. at 21.) But while it is undoubtedly a simple analysis, there is no basis to call it intellectually dishonest. Mr. Stockton never levied such a charge, and the citation provided does not support the claim. This is just another example of Folsom Chevrolet resorting to hollow rhetorical attacks against GM's experts instead of advancing an argument on the merits.

<u>Folsom Chevrolet's AGSSA</u>

The first prong of this factor is whether RSI is reasonable in light of "[g]eographical . . . characteristics in the dealer's area of responsibility." Cal. Veh. Code § 11713.13(g)(1)(A)(ii). As an initial matter, it is certain that there are no geographical *barriers* to selling in Folsom Chevrolet's AGSSA. For example, the territory is not bisected by a mountain range or lake, and there are no issues involving, *e.g.*, state boundary lines. Nor is there any evidence that Folsom Chevrolet's AGSSA is incorrectly configured, such that various tracts should be assigned to other dealers instead of Folsom Chevrolet. To the contrary, Folsom Chevrolet's expert acknowledged that the tracts were "roughly" correctly assigned based upon GM's proximity metrics. (RT Vol. 7, 123:8-25 (Stockton).)

The evidence in the record also shows that Folsom Chevrolet's AGSSA is reasonably constructed based on consumer shopping patterns. Multiple Folsom Chevrolet witnesses agreed that consumers in the towns along I-50 east of Folsom—El Dorado Hills, Cameron Park, Shingle Springs, and Placerville—do most of their shopping in Folsom. (*See* GM PFF ¶¶ 253-255.) Indeed, in its Opening Brief, Folsom Chevrolet trumpets the efforts it makes to market to those areas via radio, TV, direct mail, and advertising, suggesting consumers to its east can be persuaded to purchase from it. (*See* Br. at 6.) Supporting this view, a map of the registration locations of Folsom Chevrolet's customers reveal that many, if not most, of its sales were made to customers along the I-50 corridor within its AGSSA. (*See* P185 at 54, Tab 7 Page 3.)

It is noteworthy that when a Chevrolet dealer was located in Shingle Springs, prior to the bankruptcy, Folsom Chevrolet actually outsold that dealer *in the Shingle Springs dealer's own AGSSA*. (GM PFF ¶ 256.) Similarly, Larry Crossan testified that he believes both the former Ford dealership in Placerville, and his former Dodge store in Shingle Springs, failed because neither location could compete with the Folsom Auto Mall. (GM PFF ¶ 255.)

Thus, there does not appear to be any error in the assignment of that eastern geography to Folsom Chevrolet. Indeed, when Mr. Crossan was asked which tracts in his AGSSA should not be assigned to Folsom Chevrolet, he could not identify a single one. (GM PFF ¶ 251.)

Furthermore, evidence at the hearing established that Ford, a prime competitor for Chevrolet, has configured its dealer network in this area in almost exactly the same fashion as Chevrolet. (GM

PFF ¶ 250.) And Chevrolet offers nearly identical convenience in the Folsom AGSSA—that is, drive distance to the nearest dealership from each population centroid—as do Subaru, Ford, Kia, Nissan, Volkswagen, and Hyundai, suggesting their networks are similarly constructed as well. (GM PFF ¶ 250.) Substantial evidence thus supports RSI's reasonableness in light of the geographical characteristics in Folsom Chevrolet's AGSSA.

Folsom Chevrolet nonetheless takes issue with the size of its AGSSA, arguing that it has "a greater square mileage than all four of the other Sacramento APR Chevrolet dealers combined." (Br. at 22.) But geographic size is extremely misleading when it comes to census tracts. Each tract contains roughly 4,000 people regardless of geographic size, which means that it is the number of assigned tracts, not their physical size, which generally influences expected sales volume. (GM PFF ¶ 247.) Larger census tracts simply mean that the population density is low in those areas. (*Id.*)

Furthermore, as seen in Exhibit R290, Folsom Chevrolet's AGSSA—shaded in yellow—is not unusually large in comparison to other dealers. Nearby dealerships in Jamestown, California and Carson City, Nevada both have an AGSSA that is far larger than that assigned to Folsom Chevrolet. (R290.001.) Indeed, there are single census tracts along the Nevada border that are as large or larger than the entire Folsom AGSSA. (*Id.*) Of course, those tracts are sparsely populated, just as Folsom Chevrolet's eastern tracts are sparsely populated, and so they contribute little to any dealer's sales expectations. In fact, a map of registrations in the Sacramento APR shows that the two large tracts in Folsom Chevrolet's AGSSA farthest to the east appear to have fewer than 100 total vehicle registrations, combined, per year. (*See* R244.073.) A map made by Mr. Stockton similarly shows that census tracts comprising about half of Folsom Chevrolet's entire AGSSA account for less than 200 registrations per year. (P185 at 51, Tab 6 Page 1.)

Accordingly, despite its larger physical area, Folsom Chevrolet's total sales expectations are very much in line with the other Sacramento dealers. For example, in 2016, Folsom Chevrolet was expected to sell 1,324 vehicles, while John L. Sullivan was expected to sell 1,396, Kuni 1,355, and Maita 1,182. (*See* R246.015.) In other words, Folsom Chevrolet's AGSSA may physically be larger than, say, Kuni's AGSSA (R244.024), but each is expected to achieve approximately the same number of sales.

Moreover, sorting California Chevrolet dealers by the square mileage of their APR or AGSSA reveals no apparent connection between APR or AGSSA size and RSI. (*See* R245.051-52.) Merle Stone Chevrolet's territory in Porterville, California, is a little over 25% larger than Folsom Chevrolet, but it achieved 147.8 RSI in 2015. (R245.052.) In fact, the largest territory in the state belongs to the dealer in Victorville, California, with nearly seven times the territory of Folsom Chevrolet, but that dealer achieved a 90.1 RSI in 2015 (on an expectation of 1,431 vehicle sales). (*Id.*)

Folsom Chevrolet argues that the size of its AGSSA nonetheless matters because it is more difficult to capture customers located farther away from the dealership than those located close by. (Br. at 22.) In support of this claim, Folsom Chevrolet relies on a "ring" model created by Mr. Stockton, and based in part on work done by Mr. Farhat, that purports to show that its sales expectation should only be 617 units. (*Id.*) However, Mr. Stockton's analysis suffers from a number of methodological flaws, and Folsom Chevrolet's application of the analysis introduces additional problems.

The first issue is that Mr. Stockton misrepresented that Urban Science's data was restricted to the Sacramento APR, which is false. (RT Vol. 10, 74:6-75:15 (Farhat).) In addition, Mr. Stockton calculated which sales are in each ring in a different manner than Urban Science does, which somewhat changes the overall numbers. (*Id.*) When Mr. Farhat recalculated what Mr. Stockton's analysis purported to show, he found that Folsom Chevrolet sold 447 units against an expectation of 628 within twenty miles. (RT Vol. 10, 75:16-76:18 (Farhat); R290.003.) Mr. Stockton's presentation of this data thus both "deflated the expectation and inflated the sales." (RT Vol. 10, 86:14-21 (Farhat).) These methodological criticisms are curiously ignored within Folsom Chevrolet's briefing, undercutting the reliability of the conclusions the dealership presents.

The second issue is that Folsom Chevrolet is confused in its brief about the parameters of Mr. Stockton's analysis. Whether using Mr. Stockton's inaccurate data or Mr. Farhat's corrected data, the ring analysis only goes out 20 miles from the location of the dealership. (P186 at 14, Tab 5 Page

1; R290.003.) However, Folsom Chevrolet's AGSSA extends out quite a bit further than 20 miles; Placerville alone is about 25 miles from the dealership.[9] Thus, even if the 628-unit expectation were applicable (which it is not, as discussed below), it would only represent a portion of the full sales expectation for Folsom Chevrolet's AGSSA as it exists today. Folsom Chevrolet nonetheless compares the expectation for this smaller area (617 units, using Mr. Stockton's inaccurate data) to the sales expectation calculated for Folsom Chevrolet's entire AGSSA (1,142 units) as if this were proof that RSI's sales expectations are inflated. (Br. at 22.) They are not; this is an apples to oranges comparison.

There are other serious flaws underlying Mr. Stockton's ring analysis. Even putting aside Mr. Stockton's faulty data, the assessment is derived purely from a single year of empirical sales data by four[10] other Sacramento dealers. (*See* P186 at 14, Tab 5 Page 1.) On its face, that sample size is simply too small to draw any reliable conclusions. Folsom Chevrolet's attempt to use just four data points to disprove a decades-old metric with an approach that is "fundamental" to the auto industry stretches the bounds of credibility.

In addition, Folsom Chevrolet's application of the ring analysis assumes that the penetration profile of those four Sacramento dealers applies equally to the customers in Folsom Chevrolet's AGSSA. However, as Folsom Chevrolet likes to point out, its AGSSA is not like that of the other Sacramento dealers, because it extends to the east a considerable distance from the most populated parts of the city. (*See* R244.064.) A significantly larger percentage of Folsom Chevrolet's AGSSA is therefore rural in nature compared to the other four Sacramento dealers, especially those in the densest parts of Sacramento, like Performance and Kuni. (*Id.*)

This is important because Mr. Stockton testified that rural areas tend to have less cross-sell between markets than urban areas do, because the available options are fewer. (GM PFF ¶ 257.) In

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[9] *See* Google Maps Driving Directions, Folsom Chevrolet to Placerville, CA, *available at* https://goo.gl/maps/8s7qWMZVjFA2 (last accessed June 13, 2018).

[10] Folsom Chevrolet claims that the data is derived from "10 dealers," but this is wrong. (Br. at 22.) The original ring data chart is clear that it is based on data from the other four "Sacramento APR Dealers": John L. Sullivan, Performance, Kuni, and Maita. (R244.078.)

fact, Folsom Chevrolet quotes Mr. Stockton on this point: "[i]ntuitively if a unit of RSI expectation is in a Census tract that is 2 miles from the closest GM dealership and 32 miles from the second closest GM dealership, the closest GM dealership has more influence over that Census tract than a metropolitan dealership would over a Census tract that is 6 miles away but has 4 other GM dealerships within 10 miles." (Br. at 23.) Yet, Folsom Chevrolet makes no effort to account for this factor when considering the areas to its east, which are far closer to Folsom Chevrolet than to any other dealer.[11]

The failure to account for the more-rural nature of its AGSSA as compared to the other Sacramento dealers is fatal to Folsom Chevrolet's analysis. Indeed, its model fails to account for contrary, real-world results within its own AGSSA. For example, based on penetration data from the other four dealers, Folsom Chevrolet claims that because Shingle Springs is "over 15 miles from Folsom Chevrolet," the dealership "can only expect to capture 7.5% of the registrations there." (Br. at 22.) However, evidence shows that in 2007, Folsom Chevrolet sold 31.9% of the Chevrolet vehicles purchased in the former Shingle Springs AGSSA, even with a competing dealer operating in Shingle Springs. (R288.001.) Over the following years, the percentage sold in that area remains relatively stable, with 25.3% of the registrations in 2008, 22.5% in 2009, 32.4% in 2010, and 33.7% in 2011. (R288.002-5.)

From this data, it is plain that the ring analysis model that Folsom Chevrolet advocates does not have real-world applicability. This is simply another metric designed to make Folsom Chevrolet look better, not evidence against the reasonableness of RSI. Yet even on that basis, it fails, because Mr. Farhat showed that the ring analysis reveals Folsom Chevrolet to be only 71% as effective as the other Sacramento dealerships. (R290.003.) Folsom Chevrolet has therefore failed to rebut the evidence in the record demonstrating that RSI is reasonable in light of geographical characteristics in

[11] Folsom Chevrolet puts the closest dealers (John L. Sullivan and Performance) at 10 miles away (Br. at 23), but of course the drive time is quite a bit longer than that implies. At the time of this writing, with minimal traffic (2:00 p.m. PDT), Google estimates at least 25 minutes to drive to each. *See* Folsom Chevrolet to Performance Chevrolet, *available at* https://goo.gl/maps/vuCczZV9bPR2 (last visited June 13, 2018); Folsom Chevrolet to John L. Sullivan Chevrolet, *available at* https://goo.gl/maps/X4TxhmYBSNn (last visited June 13, 2018).

Folsom Chevrolet's AGSSA.

b. RSI is Reasonable in Light of Market Characteristics

The second prong of this factor is whether RSI is reasonable in light of "market characteristics in the dealer's area of responsibility." Cal. Veh. Code § 11713.13(g)(1)(A)(ii). Evidence in the record demonstrates that RSI is reasonable in light of the market characteristics in Folsom Chevrolet's AGSSA. Folsom Chevrolet's argument revolves around the fact that Folsom Chevrolet faces four nearby Chevrolet competitors, as well as a GMC dealer, but this argument is misplaced. (Br. at 23-24.) The existence of competition makes little sense as a basis for finding RSI unreasonable.

First and foremost, having four Chevrolet competitors nearby does not seem to hurt the other four Sacramento dealers, who have an average RSI between them of approximately 97. (*See* R244.036.) Two of them, John L. Sullivan and Maita, share an auto mall with a GMC dealership, just like Folsom Chevrolet. (R244.026.) Across California, meanwhile, the dealers most similar to Folsom Chevrolet in terms of number of competitors had an average of 156.3 RSI in 2016. (R244.048.) Thus, the mere fact that there are competitors nearby cannot excuse poor performance.

Furthermore, Folsom Chevrolet is simply wrong when it claims that RSI "does not make account for the specific number and location of competitors of the same make." (Br. at 23.) The presence of competitors is adjusted for via the assignment of census tracts, which are given to the most geographically proximate dealer. (GM PFF ¶¶ 16-17.) For this reason, Folsom Chevrolet's expected sales are not based upon sales opportunities in downtown Sacramento because other dealers are located closer to that area. (R244.024.) However, the dealership's expected sales *are* based, in part, on the sales opportunities in Shingle Springs, because Folsom Chevrolet is the closest Chevrolet dealer to that area by far. (*Id.*) Folsom Chevrolet complains that it has some tracts that as "as little as 5 or 6 miles from another Chevrolet dealer," but of course, the same is true from the other direction for the other dealers as well. (Br. at 23.) And again, those other Sacramento dealers generally have no problem achieving an acceptable RSI. (*See* R244.036.)

As for the GMC dealer in Placerville, the claim that "GMC branded trucks are essentially the same as Chevrolet Trucks" is a gross oversimplification. (Br. at 23.) The trucks are not actually identical. Furthermore, Chevrolet is the largest GM brand—much larger than GMC—and it isn't close. In 2016, more than four times as many Chevrolets were sold as GMC vehicles. (*See* GM U.S. Deliveries for 2016, *available at* http://media.gm.com/content/dam/Media/gmcom/investor/2017/jan/Deliveries-December-2016.pdf (last visited June 13, 2018).)[12] In fact, in both 2015 and 2016, there were more Chevrolet Silverados sold than all the vehicles in the entire GMC lineup. (*Id.* at 2.)

Even putting aside the brand differences, it is worth noting that Larry Crossan testified that he believes the Folsom Auto Mall is such a draw that it led directly to the failure of the Ford dealership in Placerville, as well as his own Dodge dealership in Shingle Springs. (GM PFF ¶ 255.) Likewise, in 2007, Folsom Chevrolet, operating from the same location, actually outsold the Shingle Springs Chevrolet dealer in its own AGSSA. (R288.001.) Moreover, the existence of the GMC brand is already accounted for in the RSI calculation, to the extent it impacts Chevrolet's average market share for competing vehicles. (GM PFF ¶ 280.) Thus, the available evidence shows that Folsom Chevrolet is exaggerating the threat of the Placerville GMC store to its sales.

Meanwhile, there is substantial evidence in the record supporting the conclusion that RSI is reasonable in the light of market characteristics in Folsom Chevrolet's AGSSA. As described above, because it is based on actual registrations made by actual consumers, the RSI calculation takes into account many factors that affect local markets, such as economic conditions and population changes. (GM PFF ¶ 279.) In particular, RSI takes into account how many people in the Folsom area are purchasing vehicles and the types of vehicles they are purchasing. (GM PFF ¶¶ 280-81.) Furthermore, RSI adjusts for both long-term and even temporary changes to market share at the moment they occur, meaning that the metric adjusts for consumer preferences. (*Id.*) And as a final check, the other Sacramento dealers generally perform well in RSI, rather than ranking at the bottom with Folsom Chevrolet, making clear there are no local conditions unduly weighing down

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[12] Interestingly, this chart also supports Mr. Muiter's testimony that about 80% of GM manufacturing is dedicated to retail, and 20% to fleet—in 2016, fleet sales made up 19.6% of deliveries. (RT Vol. 3, 82:17-83:5 (Muiter).)

Sacramento Chevrolet sales. (GM PFF ¶ 282.) As a result, substantial evidence supports the fact that RSI is reasonable in light of both market and geographical characteristics of Folsom Chevrolet's AGSSA.

3. RSI is Reasonable in Light of the Vehicles Allocated to Folsom Chevrolet (Cal. Veh. Code § 11713.13(g)(1)(A)(iii))

The third factor to be considered under Section 11713.13(g)(1) is whether RSI is reasonable in light of "[t]he availability and allocation of vehicles and parts inventory." Cal. Veh. Code § 11713.13(g)(1)(A)(iii). The evidence in the record on this point again supports RSI's reasonableness. As described in GM's Proposed Findings of Fact, General Motors has a long-standing, formula-based system in place to ensure dealers receive fair and equal treatment in the vehicle allocation process. (GM PFF ¶¶ 207-213.) The process equalizes the Available Days' Supply of vehicles among all Chevrolet dealerships around the country, taking into account vehicles in inventory, vehicles in transit, the dealership's sales rate, and even empirical travel time from the manufacturing plant. (GM PFF ¶¶ 208-209.) The process also provides multiple opportunities for dealers to request additional vehicles above and beyond their initial allocation, or turn down vehicles if they no longer want them. (GM PFF ¶¶ 212-13.) At the hearing, Mr. Muiter testified in detail as to the mechanics of this process and its application to Folsom Chevrolet.

In addition, on top of the regular allocation cycles, GM provided Folsom Chevrolet with additional new vehicle allocation through the Business Elite program, STMI discretionary allocation, and the notice of cure process. (GM PFF ¶¶ 214-218, 232-234.) In fact, both Mr. Escalante and Mr. Ryan routinely steered available STMI units to Folsom Chevrolet whenever possible. Mr. Ryan testified that of his 30 Business Elite dealers, Folsom Chevrolet "probably . . . received the most [STMI] out of any of my dealers in the last three years." (GM PFF ¶ 234.) A review of Mr. Muiter's chart confirms that this was a significant benefit to the dealership: from 2012 to 2016, the dealership received an additional 796 units under the STMI program. (*Id.*)

As a result of the allocation process and the additional allocation GM provided, Folsom Chevrolet had sufficient vehicles in stock overall to achieve satisfactory retail sales performance. The dealership typically maintained at or above a 200 days' supply of vehicles until June 2016, when average ADS dropped somewhat to a still-reasonable 143 days. (GM PFF ¶ 220.) In 2014, the dealership had an average monthly ADS of 266 vehicles. (*Id.*) According to Drew Crossan, these numbers typically represent more than enough inventory: "any car that we can have 193 days' supply, I can replace that car in that time frame, hopefully, if all things go to plan. So I don't need a 260-day supply." (GM PFF ¶ 221.) Mr. Farhat agreed that, given those numbers, "it's hard to believe that there was a lack of inventory at the dealership." (*Id.*) Mr. Escalante also agreed, testifying that in his years of experience in calling on the dealership, GM allocated enough vehicles for Folsom Chevrolet to be successful. (*Id.*)

Of course, GM's allocation system could not take into account the unusual sales practices of Folsom Chevrolet's fleet department, which repeatedly robbed and imbalanced the dealership's inventory to make lucrative fleet sales. As this issue was described at length in GM's Opening Brief (*see* pp. 9-14) and companion PFF (¶¶ 125-175), it will not be reiterated here, except to again note that Folsom Chevrolet's discussion of its inventory issues makes no mention of the fleet department whatsoever.

Folsom Chevrolet does argue that it was harmed by an inability to get allocation of specific hot models, as well as by constraints on the vehicles they could order. (Br. at 28-29.) The specific examples are anecdotal, of course, and add up to only a few units in total, far below the hundreds of additional vehicles per year that Folsom Chevrolet would have to have sold to achieve an RSI of 100. (*Id.*) But in any event, these challenges are a consequence of manufacturing limitations, not anything specific to Folsom Chevrolet. And as the dealership's own witnesses admitted, these limitations affect every other Chevrolet dealer equally. (GM PFF ¶ 232.) It is not a question of whether or not GM is "willing to give" units to Folsom Chevrolet (Br. at 30), but simply whether it has units to give at all, given its contractual and statutory obligations to be fair and equitable with all dealers in its allocation process.

The issue does illustrate another benefit of RSI, however. The formula uses the actual registrations of each vehicle line during the evaluation period at issue. (GM PFF ¶ 281.) That means that if a particular model is subject to manufacturing constraints, the RSI calculation will comprehend the resulting lower sales volume for that vehicle. (*Id.*) Thus, so long as the constraints are the same for all dealers—which they are—Folsom Chevrolet would not actually be adversely affected. Of course, some dealers are better at selling less-desirable vehicles than others—but that is precisely the sort of skill that RSI is designed to measure.

Folsom Chevrolet's briefing underscores this point in an interesting way. The dealership notes that it "would make an effort to sell slow selling models by discounting," which would "meet success." (Br. at 29.) But Folsom Chevrolet faults General Motors for then offering it more of the same unit that the dealership just had "success" with. (*Id.*) Of course, GM does not have quotas for sales of particular vehicles; Folsom Chevrolet could meet its sales obligations by selling nothing but discounted Malibus or Sparks, if it so chose. But by turning down allocation of purportedly "slow selling" units, right after moving those units, it lost the opportunity to do so. (*Id.*)

Another issue is Folsom Chevrolet's confusion over Mr. Muiter's testimony and charts regarding allocation. The dealership repeatedly claims that the charts indicate that Folsom Chevrolet "should have" accepted certain units. (Br. at 29-31.) But that was not at all the point of Mr. Muiter's testimony. In fact, Mr. Muiter took great pains to point out that he believes inventory ordering *should* be done by dealers, not GM, based upon the dealership's local market: "[i]t's not about what we think they ought to do." (RT Vol. 3, 108:10-110:4 (Muiter).) Rather, GM's role is to supply the tools Folsom Chevrolet can use to optimize its inventory decisions (which GM does), not to dictate what should or should not be bought. (*Id.*)

To that end, Mr. Muiter used data to illustrate how many additional vehicles Folsom Chevrolet could have ordered and purchased, *if it had chosen to do so*. (*See* R276, R277.) The fact that the dealership turned down literally hundreds of vehicles directly refutes the claim that it was not allocated enough vehicles to be successful. (GM PFF ¶ 223.) Similarly, Mr. Muiter showed that the dealership knew how to ask for extra vehicles when it needed them, earning 571 "extra" units through the consensus process over five years, and then another 210 "extra" units in the Dealer Order Submission Process ("DOSP"). (GM PFF ¶¶ 224-25.) But it only asked for extra vehicles about half the time in consensus, and 38% of the time in DOSP. (*Id.*) As a result, the evidence shows that *Folsom Chevrolet* generally felt it had sufficient inventory during the time periods in question:

> [I]t would be my conclusion that if indeed the dealer was short of desired availability, the dealer would have been more aggressive in asking for product. The times he asked for product, you can't guarantee you're going to get them each and every time, but the dealer was rewarded sufficiently each of those instances. That would suggest to me that he didn't need any more product. At the time, they were making the decision, they felt they had enough product.
>
> I think, based on today in hindsight, maybe they'd now feel they didn't have enough product, but their actions, their business decisions at the time suggested they were satisfied with the product that they had.

(RT Vol. 3, 55:21-56:15 (Muiter).)

Folsom Chevrolet also makes several contentions that do not stand up to scrutiny regarding Exhibit R277, the chart of available allocation in 2015. First, Folsom Chevrolet criticizes the idea that only having enough vehicles available to meet RSI is sufficient, because "at the end of the year, Folsom Chevrolet would not have a single unit of a model in inventory." (Br. at 30.) However, this argument misstates or ignores the way that the allocation process actually works. If Folsom Chevrolet had in fact increased its sales rate such that it sold 1,142 vehicles in 2015, rather than 652, it is a certainty that it would have obtained additional units. This is because those sales would have both depleted its existing inventory and boosted its sales rate, resulting in a substantial decrease to its ADS and placing it in the front of the line to get more vehicles.[13] This can be seen in the dealership's own example of selling 10 Sparks, then being offered "multiples of that."[14] (Br. at 29.) This is also why the allocation process is sometimes referred to as "turn and earn." (RT Vol. 9, 105:23-106:18 ((D. Crossan).)

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[13] As a simple example, say Folsom Chevrolet had 100 Silverados in stock with an average sales rate of 0.5 units per day, leading to a 200 day ADS. (GM PFF ¶¶ 208-209.) This may or may not be sufficient to earn additional units during a particular consensus cycle, depending upon other dealerships' inventory and sales rate. But if Folsom Chevrolet were to deeply discount those Silverados and quickly sell 50 of them, increasing its average sales rate to, *e.g.*, 1 unit per day, its ADS would drop to 50. (*Id.*) The dealership would then be significantly more likely to earn additional Silverados during the consensus cycle.

[14] Curiously, this specific claim does not appear to be supported by the data. Folsom Chevrolet did not turn down any Sparks during the allocation process, whether during consensus or DOSP, from 2012 to 2016. (R276.002-3.) In fact, the dealership actually appears to have wanted *more* Sparks; in 2014, it was allocated 3 units but received an additional 7 units in consensus, 6 units through STMI, and then another 9 units through DOSP requests. (*Id.*) In 2015, meanwhile, it requested and received an additional 3 units above its initial allocation. (R277.002.) At no point from 2012 to 2016 was Folsom Chevrolet offered "multiples" of 10 Sparks. (R276.002-3.)

Second, Folsom Chevrolet attempts to retrofit its inability to make sales to only those lines that were difficult to obtain in 2015. For example, the dealership notes that the chart reflects that its availability for Camaros in 2015 was 20 less than it was expected to sell. (Br. at 30.) This is a reasonable point, although not entirely fair, as it does not take into account that additional sales would have earned additional units. (R277.002.) But Folsom Chevrolet then proceeds to add up only the deficiencies on the chart, which sum to 95 units, while *ignoring all the vehicles lines that had a surplus*. (Br. at 30-31.) In Folsom Chevrolet's telling of this tale, all of its issues boil down to only a few vehicle lines—"Folsom Chevrolet lost sales because General Motors would not give it enough Chevrolet Volts, Colorados, Camaros, Corvettes, Traxes, or Suburbans to meet the sales expectation for the related market segments." (Br. at 32.)

This argument is nonsensical. For one thing, the evidence shows that the issue is not that GM refused to provide it with vehicles from those lines:

- **Camaro**: Mr. Escalante provided the dealership with 5 units of discretionary STMI Camaros in 2015. (R276.002.) However, the dealership declined a unit of allocation during both the first and second allocation phases (2 total). (R277.002.) Furthermore, it could have received a minimum of 13 additional Camaros during the DOSP process, if only it had asked—but it did not ask. (R277.002.)
- **Corvette**: Mr. Escalante provided the dealership with discretionary STMI units for Corvette in 2015, in this case 3 units. (R276.002 ("VET").) Overall, the dealership received only one fewer Corvette than was needed to make a state-average number of sales. (R277.002.)
- **Volt**: Although the dealership received no STMI Volts in 2015, it received approximately 20 from 2012-2016 overall. (R276.002.) Furthermore, Folsom Chevrolet could have received additional Volts at least five times in 2015, simply by asking—but again, it did not ask. (R277.002.)
- **Colorado**: Mr. Escalante provided the dealership with discretionary STMI units in this line in 2015, in this case 5 vehicles. (R276.002.)
- **Trax**: It is not clear why this line is included; the dealership turned down 7 Trax units in 2015, and had potential availability of 16 units more than its sales expectation. (R276.002.) Folsom Chevrolet sold only 4 Traxes in 2015 in total, although a state average dealer would have sold 11. (*Id.*)
- **Suburban**: Folsom Chevrolet earned 3 Suburbans in 2015, but it was able to obtain 9 more simply by asking. (R276.002.) Yet it only asked for more Suburbans 57% of the time in consensus, and 23% of the time in DOSP. (R276.002-3.)

More importantly, focusing on just these vehicle lines misses the forest for the trees. The 95 units of availability "deficiency" represent a small fraction of the 490 sales Folsom Chevrolet failed to make in 2015. (R277.002.) And again, the dealership's performance is assessed by total retail sales, not sales for specific vehicle lines. If Folsom Chevrolet had made state average sales in every vehicle line it had surplus availability, but missed by those 95 units, its RSI would have been 1,047 / 1,142 = 91.7—and it is very unlikely that GM would have proceeded to terminate the Dealer Agreement. (*See* RT Vol. 5, 27:15-28:9 (Farhat).)

Obviously, that is not what happened. A closer review of Mr. Muiter's chart demonstrates that Folsom Chevrolet's problems were not, in fact, tied to inventory availability in specific lines. For example, Folsom Chevrolet had significant opportunity available in the Equinox line, where it had 51 units more than was needed to make a state-average number of sales. (R277.002.) Nonetheless, Folsom Chevrolet sold 30 fewer Equinoxes than the average dealer. (*Id.*) Folsom Chevrolet similarly fell short in the Cruze line, where it had 29 units more than were needed, but still fell 35 sales short of state average. (*Id.*)

Yet the biggest deficiency by far was in Silverado 1500 (light duty) trucks. Folsom Chevrolet had 90 units in stock at 2015, and was provided with 303 units more during the year. (*Id.*) A state average dealership in Folsom Chevrolet's market would have sold 385 units—16 less than it was allocated, not taking into account additional allocation earned along the way. (*Id.*) But Folsom Chevrolet actually sold just 181 Silverado 1500s in 2015, less than half of the sales expectation. (*Id.*) Including Silverado 2500 and 3500, Folsom Chevrolet had 544 units available, and was expected to sell 489 units (55 units less than were available). However, it only made 254 sales—46.7% of state average. (*Id.*)

The resulting 235 unit "loss" in Silverado sales represents almost half of the variance between the dealership's sales and state average for 2015, yet that vehicle line is never mentioned in Folsom Chevrolet's Opening Brief. The most likely explanation for the omission is that the Silverado was frequently sold from inventory to fleet purchasers by Mr. Schoonbrood. As noted above, the dealership was allocated plenty of Silverados, yet when he reviewed their inventory records, Mr. Stinson found the number of Silverados in stock to be so small it was "glaring." (RT Vol. 2, 295:16-24 (Stinson).)

A review of column 4 of Mr. Muiter's chart, which shows whether Folsom Chevrolet was above or below state average in each vehicle line, demonstrates how widespread the dealership's issues were. Folsom Chevrolet may claim that missing Camaros and Volts were the cause of its poor sales, but the reality is that it was below state average in almost every single vehicle line. (R277.002.) In fact, the *only* vehicle lines that were higher than state average were the City Express van (which the dealership sold 3 of, against an expectation of 2) and the very vehicles Folsom Chevrolet derides GM for allocating too generously: Spark and Impala. (*Id.*; Br. at 32.)

Perhaps recognizing that the data does not support its claims, Folsom Chevrolet's final argument is that General Motors selected 2015 because that was the year GM provided the dealership with supplemental allocation. (Br. at 31.) Folsom Chevrolet then claims, without any evidence or support, that the "2016 version of this chart" or the "2014 version" would show significant shortages of units, insinuating that GM has cherry-picked its data. (*Id.*)

This is doubly wrong. First, even though Folsom Chevrolet doesn't cite to it, Mr. Muiter testified that *he* picked 2015 to review, specifically because it was during the cure period, when the dealership's sales performance was most at issue. (RT Vol. 3, 60:16-21 (Muiter).) Second, even though Folsom Chevrolet ignores it, there is sufficient data in the record to test Folsom Chevrolet's claim that 2014 or 2016 would look different.

Using 2014 as an example, Exhibit R276 provides information as to vehicles allocated, additional vehicles received by asking, STMI and Business Elite units received, and allocation turned down, both for the consensus and DOSP phases. (R276.002-3.) The chart shows that Folsom Chevrolet was allocated 459 vehicles, and got an extra 124 by asking, but it also turned down 106 units. (R276.002.) Overall, it asked for additional product 50% of the time. (*Id.*) The dealership also received 205 units through the STMI program, and 60 units through the supplemental Business Elite allocation, leading to a total allocation of 742 units. (*Id.*)

Turning to the second phase, DOSP, Folsom Chevrolet received an additional 62 units simply by asking. (R276.003.) However, it only asked for additional units 42% of the time. (*Id.*) It did not turn down any units during this phase. (*Id.*) As a result, it actually received 804 vehicles for its inventory, but could have received 910 if it had not turned down any units. Notably, this does not include any additional units the dealership could have received by asking, whether in consensus or

DOSP, as that information is not in the record.

As of December 31, 2013, the dealership reported in its financial statements that it had 83 cars and 174 trucks in inventory, for a total of 257 units. (R243B.017.) That leads to total availability during the year of 1,061 units, with the potential for at least 1,167 units simply by not turning down allocation. And again, that does not include any additional inventory available by asking. Meanwhile, Folsom Chevrolet was expected to sell 963 units for calendar year 2014, meaning the dealership had enough units to comfortably make its sales targets. (R242C.002.) Folsom Chevrolet's claim that these numbers would "likely" show a shortfall is wishful thinking. (Br. at 31.)

Recreating this analysis for each year yields the following chart:

Year	Starting Inventory	Alloc.	Turned Down	Add'l Avail.	Total Opportunity	Exp. Sales	Var.	Retail Sales	RSI
2013	226	572	185	?	983+	904	79	370	40.9
2014	257	804	106	?	1,167+	963	283	428	44.4
2015	389	885	146	103+	1,544+	1,142	402	652	57.1
2016	264	1,136	3	?	1,403+	1,324	79	738	55.7

Thus, it appears that at no point from 2013-2016 did the dealership have a shortfall in allocation vs. expected sales.[15] This is despite the dealership's poor sales rate, which if improved would have resulted in additional vehicles.

In sum, the record shows that Folsom Chevrolet was provided with the tools to acquire the inventory it needed to meet its sales performance obligations. Despite those tools, Folsom Chevrolet failed to meet state average across nearly every single vehicle line, regardless of inventory availability. Even in the chart above, there is no apparent correlation between inventory and sales rate. The dealership performed better in 2016 than in 2014, even though in 2014 its inventory opportunity was higher relative to its expected sales than in 2016.

To the extent the dealership did experience shortfalls, these are highly likely to have been caused by the activities of its own fleet department. (GM Br. 9-14; R- PFF ¶¶ 125-175.) Mr.

[15] 2012 cannot be assessed because the 2011 financial statements are not in the record, meaning the dealership's starting inventory is unknown. GM also notes for completeness that there are minor discrepancies in inventory numbers across various charts in the record, but none are significant enough to change the results presented here.

Schoonbrood estimated that he sells 270 to 360 vehicles from the dealership's inventory each year. (GM PFF ¶ 146.) Indeed, in 2017, 31.5% of the vehicles delivered to the dealership for its inventory were sold to fleet customers. (GM PFF ¶ 148.) These sales cannot help but have a significant impact on the numbers in the chart above, but Folsom Chevrolet's opening briefing simply ignores the issue. It seems the dealership thus has little to defend itself with on that point.

Accordingly, substantial evidence at the hearing established that the availability and allocation of vehicles did not cause Folsom Chevrolet to have unreasonable difficulty in meeting RSI.

4. RSI is Reasonable in Light of Local and Statewide Economic Circumstances (Cal. Veh. Code § 11713.13(g)(1)(A)(iv))

The fourth factor to be considered under Section 11713.13(g)(1) is whether RSI is reasonable in light of "[l]ocal and statewide economic circumstances." Cal. Veh. Code § 11713.13(g)(1)(A)(iii). The evidence in the record again supports RSI's reasonableness on this point, because RSI adjusts for the number of registrations made in Folsom Chevrolet's local area. Thus, to the extent economic conditions impact vehicle sales, RSI automatically adjusts for those conditions.

Furthermore, as noted, Folsom Chevrolet generally faces favorable conditions in terms of demographics. (GM PFF ¶ 286.) It is located in a fast-growing, wealthy area; the population of Folsom grew 39% from 2000 to 2010. (GM PFF ¶ 287.) The average household income is over $100,000, which is higher than state average. (*Id.*) And new businesses continue to relocate to the area, including tech companies. (*Id.*)

Meanwhile, California and the national economy continue to grow. SAAR, a measure of the auto industry's sales as a whole, has been going up for almost a decade, and is now at the highest level it has ever been. (GM PFF ¶ 287.) Chevrolet specifically has been successful over the last few years; in fact, it has increased its retail market share in Northern California and nationally for the last three years. (*Id.*) RSI takes into account these demographic and economic changes as well, by adjusting for the number of Chevrolet registrations made statewide. As a result, there is no reason why local and statewide economic circumstances would cause Folsom Chevrolet to have unreasonable difficulty in meeting RSI.

5. RSI is Reasonable is Light of Historical Performance Measures in Folsom Chevrolet's AGSSA, Including Vehicle Brand Preferences (Cal. Veh. Code § 11713.13(g)(1)(A)(v))

The final factor to be considered under Section 11713.13 is the "[h]istorical sales . . . performance of the line-make within the dealer's area of responsibility, including vehicle brand preferences of customers in the dealers area of responsibility." Cal. Veh. Code § 11713.13(g)(1)(A)(v). Once again, the evidence establishes that RSI is reasonable under this prong of the statute.

With respect to historical sales performance, Folsom Chevrolet's own experience demonstrates that it is possible to achieve satisfactory sales performance as measured by RSI. In the early 2000s, operating from the same location, the dealership routinely sold more than a thousand pickup trucks each year alone. (GM PFF ¶ 286.) If the dealership had sold the same number of vehicles in 2016 as it did in 2003, it would have met its sales performance obligations. (*Id.*) And conditions are more favorable to sales now than before; the population of Folsom grew 39% from 2000 to 2010. (GM PFF ¶ 287.) Plus, Folsom Chevrolet no longer has to contend with competing dealers in Shingle Springs and Jackson. (GM PFF ¶ 45.)

Nor is there evidence that brand preferences in Folsom Chevrolet's area are working against it. Folsom Chevrolet claims that "[i]t is clear there is brand bias at work" (Br. at 21), but its argument boils down to only two components, each of little substance. First, Folsom Chevrolet points to the fact that the average RSI in California as a whole is 132, while for the other four Sacramento dealers, it is only 97. (Br. at 20.) But considering the goal for Folsom Chevrolet is 100, not 132, it is not at all clear why this matters. Whatever the average RSI of dealers in other parts of California, Folsom Chevrolet only needs to reach the sales levels already being achieved in the Sacramento market. Contrary to the dealership's claims, this fact simply shows that there is nothing about being in Sacramento which makes it impossible to achieve an RSI of 100.

Moreover, this is a particularly disingenuous argument for Folsom Chevrolet to make given that its own expert, Mr. Stockton, spent significant time discussing why the "simple average" of 132 must be viewed with caution, using the example of housing prices in San Francisco, New York City, and Bovine, Michigan. (RT Vol. 7, 17:20-20:11 (Stockton).) Indeed, Mr. Stockton chalked up the 132 average to "a skew in favor of small dealers," and opined that "the real average is going to be slightly above 100 percent." (*Id.*) Thus, even in Folsom Chevrolet's expert's own mind, the Sacramento market's 97 RSI is not a material deviation from the "real average" of California markets.

The other argument Folsom Chevrolet makes is that registrations in California as a whole show a geographical skew, with higher market share in a "cluster of counties in the Central Valley" compared to the rest of California. (Br. at 19.) Folsom Chevrolet claims that this "clustering . . . indicates that there is a systemic issue that is impacting RSI" and that if it were caused by dealer performance, "it would appear more random." (Br. at 19-20.) Folsom Chevrolet purports to support this claim with maps showing whether each county was above or below California average market share for Chevrolet in that year. (*See* P185 at 43-47, Tab 4 Pages 6-10.)

As an initial matter, it is noteworthy that Mr. Stockton did not produce any maps or data demonstrating the *level* of purported skew. Taking his argument at face value for the moment, it is obvious that a county at 99% of California average would have significantly less skew than one at 1% of California average—yet each appears the same in the maps created by Mr. Stockton. (*Id.*) By contrast, a heat map could have conveyed the extent to which each county deviates from the norm, but no such graphic was presented at the hearing.

An even more glaring omission by Folsom Chevrolet, however, is any effort to address the analyses presented by the experts showing that Folsom Chevrolet is a poor performer even when the benchmark is changed to a localized standard. Mr. Farhat ran numerous tests to confirm the reasonableness of RSI, and while the specific numeric values change with the benchmark at issue, the common finding was that Folsom Chevrolet always comes in last (or near-last) of whatever comparison group was used—typically, Sacramento dealerships. (GM PFF ¶ 297.)

Thus, Folsom Chevrolet ranks last among the five Sacramento dealers using the normal RSI calculation. (GM PFF ¶ 298.) But it continues to rank last in the comparison group of 5 Sacramento dealers when the average market share data benchmark is changed from the State of California as a whole to a smaller area, such as Northern California (*id.*), the Sacramento DMA (*id.*), the 5 County area (GM PFF ¶ 299), or Sacramento alone. (GM PFF ¶ 298.) The numbers may change on an absolute basis, particularly if using Sacramento alone, because that market share data is heavily affected by Folsom Chevrolet's poor retail sales performance; Mr. Farhat referred to this as "a problem of measuring yourself against yourself." (*Id.*) However, that does not change the conclusion that Folsom Chevrolet is last among the comparison group. (*Id.*)

Indeed, even under Mr. Stockton's demographic "model," Folsom Chevrolet still comes in last among the 5 Sacramento dealerships. (GM PFF ¶ 299.) This is a model that took literally hundreds of hours to create, from a firm that has "been working on this issue for decades," presented on behalf of Folsom Chevrolet, and it still confirms that Folsom Chevrolet is the least effective dealer in the Sacramento market. (*Id.*) Similarly, the original "ring" analysis performed by Mr. Farhat found that Folsom Chevrolet captures sales at a far lower rate than the other Sacramento dealers at every range, but particularly in the closest "rings." (GM PFF ¶ 300.) Folsom Chevrolet's poor performance in this metric cannot be attributed to its AGSSA, nor can it be attributed to local brand preferences, because it was measured solely against other Sacramento dealers. (*Id.*) As a result, it appears RSI has not been misled by "brand bias," but instead has correctly identified Folsom Chevrolet as a poor sales performer.

Other evidence in the record confirms that the Sacramento market does not suffer from a "brand bias" against Chevrolet. For one, dealer loyalty reports routinely show that Folsom Chevrolet's customers were not necessarily leaving the dealership for other brands—they were leaving for *other Chevrolet dealerships*. (See GM PFF ¶ 200.) In 2014, for example, the number one model of vehicle purchased by customers who defected from Folsom Chevrolet, by far, was the Chevrolet Silverado. (*Id.*) In fact, there were as many Silverados purchased by defecting customers (27) as the next three models combined. (*Id.*)

Similarly, John L. Sullivan Chevrolet hits 140+ RSI year after year, despite operating only ten miles away from Folsom Chevrolet. (R244.040.) In 2015 alone, the dealership sold over 1,766 Chevrolet vehicles from that location. (R246.021.) Thus, if there is a "brand bias" against Chevrolet in the Sacramento metro area, it clearly has not stopped John L. Sullivan from meeting RSI.

But there is an even more direct line to contradict Folsom Chevrolet's claim, and that is the testimony of its owner, Mr. Marshall Crossan. Mr. Crossan has operated a Chevrolet dealership in the Folsom area for 25 years, and yet he testified that he was not aware of any bias against Chevrolet vehicles in the AGSSA. (RT Vol. 8, 224:4-11 (M. Crossan).) As a matter of fact, not a single witness testified in support of the claim that consumers in the area are biased against Chevrolet—not even Mr. Stockton.

To the contrary, the testimony typically went the other way. For example, Mr. Kaestner testified that he has discovered that it is much easier to sell GM products than Chrysler because of GM's superior incentive pricing. Specifically, in his "experience in being a Chrysler guy, that we don't have the type of incentive that GM has. . . . [N]ow being with GM, I can see why GM outsells the Dodge product. Because they put additional . . . cap money, which could be 5- or $10,000 essentially on certain vehicles." (RT Vol. 9, 237:25-238:17 (Kaestner).) He continued, "we're not seeing that with Chrysler." (*Id.*) Nor is the issue with the product, as Mr. Crossan himself asserted in 2015 that GM "currently has the best product line I've seen in my 23 years as a Chevrolet dealer." (GM PFF ¶100.)

The lack of any discernable brand bias also makes the *Beck* case cited by Folsom Chevrolet inapposite. *Beck Chevrolet Co., Inc. v. General Motors LLC*, 53 N.E.3d 706 (N.Y. 2016). In that case, which is not controlling here, the New York Court of Appeals held that RSI was not reasonable *for the dealer at issue*. *Id.* at 713. However, the Court held that the issue was not because RSI was unreasonable as a concept, but only because it failed to account for what the Court found to be sharp and measurable differences in brand popularity between upstate (rural) New York and the downstate region near New York City. *Id.* at 711. The New York court thus determined that the use of a statewide average market share was unfair when applied to "dealers, like Beck, who service an assigned area in which Chevrolet is less popular [as they] are disadvantaged when measured against dealers in other parts of the state in which the Chevrolet brand is stronger and facilitates dealer sales performance." *Id.* at 713.

As applied to the Folsom and Sacramento areas, however, the *Beck* argument falls apart, because there is no evidence that Chevrolet vehicle sales are at any disadvantage in those areas. If there were, dealers like John L. Sullivan would not be able to massively outperform state average performance year after year, and the metro area as a whole would not reach an average of 97 RSI. Furthermore, unlike in *Beck*, General Motors has performed confirmatory checks using benchmarks specifically based on market share in variously-sized local areas, including Northern California (GM PFF ¶ 299), the Sacramento DMA (*id.*), the 5 County area (*id.*), or Sacramento alone. (GM PFF ¶ 298.) Yet Folsom Chevrolet never achieves even 80 RSI under any of those benchmarks, and it remains the worst performer in the area. (*Id.*) The evidence in the record thus establishes that RSI is reasonable in light of historical sales performance and brand preferences in its area.

In sum, substantial evidence supports the reasonableness of RSI, including in light of each of the factors listed under the statute. More broadly, RSI is generally "fair," it utilizes a "rational" approach that adjusts for many different possible effects, and it is similar to the approach used by GM's competitors in the automotive industry. That is not to say that RSI is objectively "perfect," but it is certainly reasonable. *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014) ("[t]o be reasonable is not to be perfect"). As a metric, RSI does an excellent job at comparing sales performance across a wide range of markets and a wide range of market-affecting conditions.

However, the final point to make is that RSI is only one tool in the company toolbox. The reality is that no one standard could possibly account for every variable that might affect sales performance at the dealership. In fact, to expect such perfection would not be reasonable. *Valdez*, 302 F.3d at 1046 (reasonableness "does not require an exact fit"). But the truth is that GM knows this, and so it does not rely solely on RSI when making decisions relating to terminations. RSI is simply the "first step . . . an indicator that's then confirmed with a deeper dive into what's happening at the operation." (RT Vol. 5, 26:17-27:14 (Farhat); *see also* RT Vol. 7, 139:22-140:19 (Stockton) (agreeing that "RSI is a . . . good first step" and a "weathervane" that shows "which dealerships are producing more or less").) It is only when that deep dive reveals "substantial nonperformance over a prolonged period of time" that GM proceeds to termination. (RT Vol. 5, 28:10-29:2 (Farhat).)

Here, the record is replete with additional steps that GM took to confirm what the "weathervane" of RSI was showing it, in the form of years of counseling and efforts to assist the dealership. These efforts included quarterly meetings with Mr. Stinson; 200+ visits from Mr. Escalante over four years; free consultations with Maritz representatives; the in-depth POP meeting that kicked off the performance improvement program; repeated AGSSA configuration reviews; STMI and supplemental allocation of vehicles; and more. (GM PFF ¶ 301.) And as a final check, Mr. Giguere performed tests using the localized Sacramento DMA as a benchmark, ensuring that the issue discussed in *Beck* was not an issue here. (GM PFF ¶ 115.) However, each of these steps only confirmed what RSI first found: that Folsom Chevrolet is a poor sales performer, no matter how the data is sliced.

Consequently, a review of RSI in light of the evidence in the record can only find that the standard is reasonable under Section 11713.13(g)(1). It is reasonably and fairly designed; it is reasonably and fairly communicated to dealers; and above all else, it was reasonably and fairly applied to Folsom Chevrolet.

III. GENERAL MOTORS HAS GOOD CAUSE TO TERMINATE FOLSOM CHEVROLET'S DEALER AGREEMENT

The majority of Folsom Chevrolet's arguments in its brief concern the reasonableness of RSI, but these claims ultimately fail to persuade. Turning now to the factors at issue under Vehicle Code Section 3061(a), the evidence in the record shows that General Motors has established good cause to terminate Folsom Chevrolet's Dealer Agreement.

A. <u>Folsom Chevrolet Fails to Capture the Business Available to It (Cal. Veh. Code § 3061(a))</u>

The first good cause factor considers the "[a]mount of business transacted by the franchisee, as compared to the business available to the franchisee." Cal. Veh. Code § 3061(a). In General Motors' Opening Brief, it explained that Folsom Chevrolet has repeatedly failed to capture the retail sales available to it, selling 3,209 fewer vehicles than a state-average dealer over just six years. (GM Br. at 7-8.) The issue is not simply that Folsom Chevrolet is "below average" (Br. at 43), but that it has been one of the very worst performers in the state of California for over half a decade. (GM PFF ¶ 113.) In fact, from 2012 to 2016, its *best* result was ranking 115th of 131 dealers in the state, placing it in the bottom 13%. (*Id.*)

Moreover, as described in GM's Opening Brief, Folsom Chevrolet's inability to sell vehicles to retail customers are due to its own operational decisions, including most notably its decision to allow its fleet department to take hundreds of vehicles from its inventory each year in order to make lucrative fleet sales. (GM Br. at 9-14.) This practice, which GM repeatedly discouraged, resulted in an imbalanced and inadequate inventory of vehicles for retail customers to consider. (*Id.*; GM PFF ¶¶ 158-163.) For example, the number of Silverados the dealership actually had in stock was a "glaring" problem for the dealership. (RT Vol. 2, 295:16-24 (Stinson).)

In addition, Folsom Chevrolet had issues with its BDC, customer satisfaction, and personnel accountability. (GM Br. at 15-19.) Furthermore, its sales staff often "held out for gross," causing potential sales to go elsewhere for a better deal. (GM Br. at 14-15.) In this regard, it is notable that Folsom Chevrolet states that its "discounting" during 2016, "coupled with an advertising push . . . at the end of the day sold more vehicles." (Br. at 8.) This confirms that the dealership had the ability to increase its retail sales rate by altering its pricing schemes and marketing strategies; it just chose not to do so. (*See* GM PFF ¶ 180.)

In an effort to defend its business decisions, Folsom Chevrolet argues that the gross profit per vehicle of $877 it earned in 2016 after this discounting was "far below average." (Br. at 8.) However, Mr. Farhat's analysis revealed that this is false; through June 2016, the average gross profit per vehicle for other California Chevrolet dealers was $603. (R244.080.) Furthermore, the dealership's claim that this "heavy discounting . . . greatly reduced Folsom Chevrolet's gross profit" is contradicted by data provided by its own expert. (Br. at 8.) Mr. Stockton showed that, because the dealership sold more units in 2016 than in prior years, it qualified to earn an additional $543,927 in incentives from General Motors under the SFE program. (GM PFF ¶ 186.) These SFE incentives effectively replaced all of the gross profit the dealership "lost" by pricing its vehicles more competitively. (*Id.*; P185 (Stockton Report) at 80, App. p. 12.) As a result, in 2016, Folsom Chevrolet actually had its most profitable year since the recession, recording a profit of $1,639,756, on top of the $397,302 dividend it paid to cover Mr. Crossan's personal income taxes. (GM PFF ¶ 186.) Thus, as it turns out, Folsom Chevrolet did not even have to sacrifice profits in order to competitively price its vehicles.

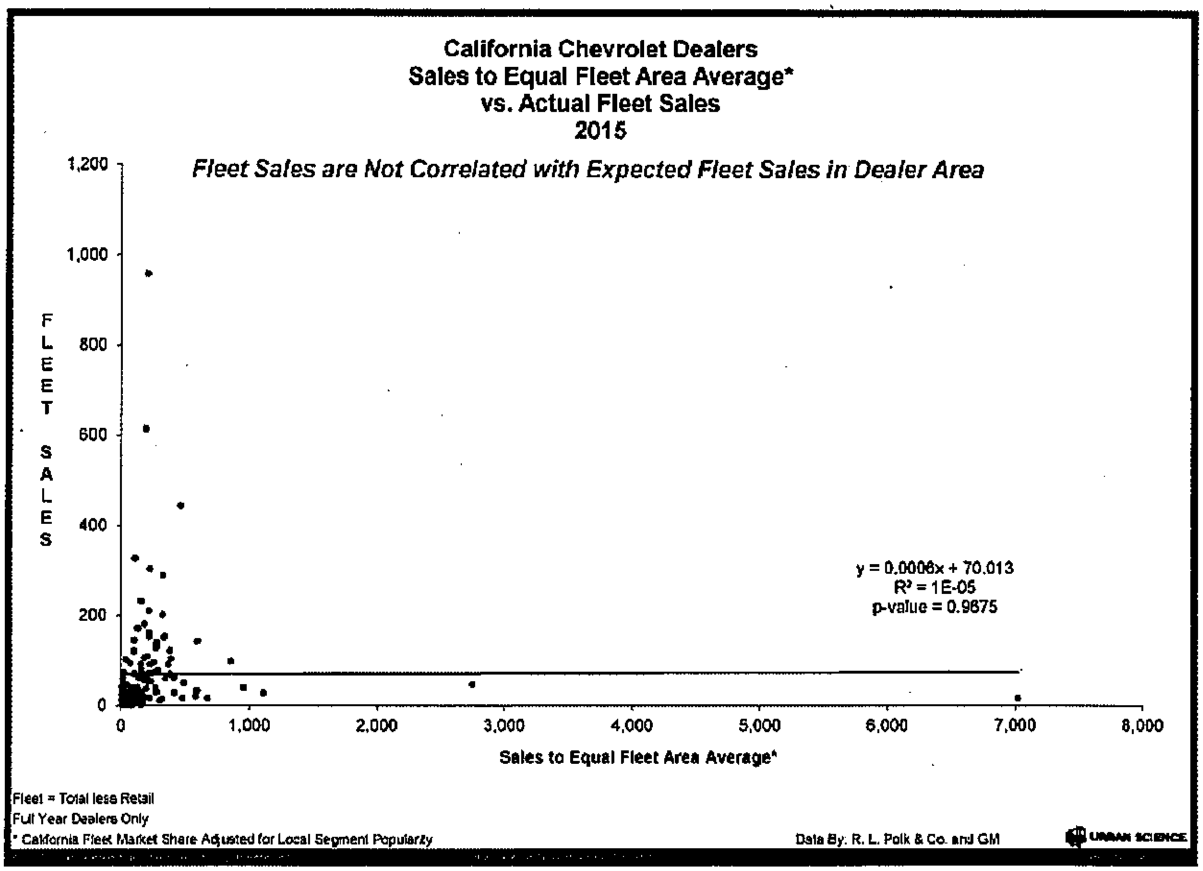
Folsom Chevrolet's discussion of this factor mostly ignores these inconvenient facts, instead focusing on the flawed arguments GM rebutted above regarding RSI and inventory. One point does bear additional scrutiny, however, and that is Folsom Chevrolet's claim that the Vehicle Code requires General Motors to consider fleet sales made by the dealership on an equal footing with retail sales. (Br. at 23-24.) To that end, Folsom Chevrolet puts significant emphasis on the "TSI" metric developed by Mr. Stockton, with the dealership stating that its TSI scores "establish[] that Folsom Chevrolet is above average for total new car sales in the state." (Br. at 27, 42.) That emphasis is surprising because, as mentioned previously, Mr. Stockton testified *five different times* that he does not advocate the use of TSI as a performance measure. (RT Vol. 7, 89:16-22, 89:23-90:22, 112:7-11, 120:9-17, 122:19-23 (Stockton).)

There were good reasons for Mr. Stockton to distance himself from TSI. The metric adds in fleet registrations into the formula uncritically, at the place where the registrations are made. As a result, TSI sales expectations for dealerships located near airports are massive, even though dealers near the airport realistically have little chance of capturing a high percentage of those sales. (RT Vol. 5, 88:18-90:14 (Farhat).) More broadly, the assumptions underlying RSI, such as sales correlating with nearby opportunity, do not hold when applied to TSI, because fleet sales are not proximity-sensitive. (R246.022; GM PFF ¶ 264.) To cast the issue in terms of the statutory criteria, TSI does not actually measure the fleet business available to Folsom Chevrolet (or any other dealer).

Folsom Chevrolet's own sales bear this out. Mr. Farhat's analysis found that 74.9% of its retail sales were made into its APR (the Sacramento metro area) from 2013-June 2016, while only 15.1% of its fleet sales were made in that area.[16] (GM PFF ¶ 265.) Similarly, Mr. Muiter analyzed Folsom Chevrolet's fleet sales in 2017, and found that of about 493 units sold fleet, only 39 percent were even reported as sold to addresses in California. (*Id.*) Of those vehicles sold in California, the addresses reported were "as high north as Chico, as far south as Anaheim." (*Id.*)

[16] This data was backed up by testimony from Folsom Chevrolet witnesses. For example, Mr. Crossan testified that the large Solar City fleet sale made in 2015 went primarily to "Southern California and the Bay Area." (GM PFF ¶ 266.) And Mr. Schoonbrood testified that he makes a lot of sales "to the Bay Area or between here and the Bay Area. . . . I've got them down to LA sometimes. Every once in a while, I'll get something going out of state." (*Id.*)

Consequently, when Mr. Farhat created a chart mapping fleet sales against expected fleet sales, he found that there is no correlation between the two whatsoever:



(R246.023.) In fact, expected sales actually correlate negatively within the 5 County Area selected by Mr. Stockton—meaning that for each additional unit of opportunity judged to be available under TSI, dealers actually make slightly *fewer* sales. (*See* R246.023-24.)

In short, TSI is not a serious metric, both because of Mr. Stockton's disavowal of the standard and because it does not measure anything of value. But even if the methodology were appropriate, it still would not validate Folsom Chevrolet's unsupported (and uncited) assertions that RSI is "fail[ing] to account for the true amount of business available" and that "the Vehicle Code requires General Motors to make a showing of the true amount of business available to Folsom Chevrolet." (Br. at 24.) Folsom Chevrolet's tendentious framing of fleet sales as "true" business ignores the fact that General Motors has made a business decision to focus on *retail* customers, not fleet customers. (GM PFF ¶¶ 259-268.)

Mr. Muiter described the company's approach as follows:

> [A]s I look across the organization from a resource perspective, engineering resources, material resources, people resources, and the competitive challenges, it's primarily on the retail side. Again, 80 percent of the industry is made up of retail sales. Those are individual sales to consumers with the other 20 percent dedicated to fleet sales.

(GM PFF ¶ 261.) This is not an arbitrary or trivial choice: "When I take a look at our manufacturing schedule, we dedicate about 20 percent of our schedule to fleet, and that's a negotiated number internally, and there's a lot of reasons for that." (*Id.*)

In order to support this business decision, General Motors has put extraordinary resources into developing a brand that serves its business model of making retail sales. "[A] retail customer is one at a time," and so "both GM and the dealer try to create an image in the community with that retail customer both on the brand awareness, the quality of the product, the availability of the product through advertising both media, digital," all just to "create an awareness where you're part of the consumers' consideration when they're deciding to make a purchase." (GM PFF ¶ 262.)

General Motors has also put extraordinary resources into developing its dealership network—again, to make retail sales. Unlike fleet sales, retail sales are highly proximity-sensitive, so its dealers must be "located in a location that's convenient for the customer. . . . You want to have it where it's good visibility, accessible to the customer, so that they can attract that retail customer." (GM PFF ¶ 263.) GM does everything it can to increase that convenience; there are 3,000 dealers for Chevrolet in the United States alone. (*Id.*) As Mr. Giguere put it, "the reason really that we have thousands of dealers in local communities around the country is to serve the needs of retail customers." (RT Vol. 2, 462:2-9 (Giguere).) Indeed, GM's entire method of assigning territory is fundamentally based on convenience and geographical proximity to local customers. (GM PFF ¶ 263.)

Put differently, if the dealer near LAX fails to make *fleet* sales at the airport, a different Chevrolet dealer can cover the gap, whether they are located nearby or in another state entirely. But if the dealer near LAX fails to make the *retail* sales available to it, it is far more difficult for other dealers to cover that gap. Most likely, GM will lose customers, as they seek out other brands with greater convenience.

Thus, fleet sales are appreciated, but retail sales are GM's (and the Dealer Agreement's) *raison d'être*. For this reason, retail sales are the focus of the Dealer Agreement, and RSI is the metric specified to measure dealer sales performance. (*See supra*, Argument § I(B)(1); GM PFF ¶ 268; RT Vol. 3, 132:13-21 (Giguere) ("[O]ur focus and emphasis is on retail sales. And [RSI is] the key metric that we use to measure the dealer's performance. We focus on the retail sales performance for the dealer.").) Folsom Chevrolet agreed to these terms, including that its sales performance would be assessed by RSI, when it signed the Dealer Agreement.

Folsom Chevrolet's insistence that it should be held to a different standard than the one provided by the Dealer Agreement is unavailing. The Vehicle Code language states that good cause depends in part on the "[a]mount of business transacted by the franchisee, as compared to the business available to the franchisee." Cal. Veh. Code § 3061(a). Because this case involves a termination of a franchise, it only makes sense that the "business" at issue is the "business" emphasized, assessed, and ultimately at the foundation of that franchise—retail sales.

In addition, the dealership's refusal to recognize that the issue is not that it is making fleet sales, but rather *how* it is making fleet sales, demonstrates the root cause of its problems. This is not a situation where Folsom Chevrolet is taking large numbers of fleet orders while maintaining a successful retail operation. Rather, it is making fleet sales from its own inventory, directly harming its ability to make retail sales, despite GM's direct discouragement of this practice and its knowledge of that fact. (GM PFF ¶¶ 141-171.) Considering Folsom Chevrolet's fleet sales are a direct cause of its own problems, those same sales cannot be permitted to paper over the dealership's dismal retail sales performance.

On the evidence in the record, there can be no dispute that Folsom Chevrolet has failed to transact the retail sales business available to it. This factor therefore supports termination.

B. <u>Folsom Chevrolet Investment in its Business is Relatively Minimal and Impermanent (Cal. Veh. Code §§ 3061(b), (c))</u>

The second and third good cause factors look at both the "[i]nvestment necessarily made and obligations incurred by the franchisee to perform its part of the franchise" as well as the "permanency" of that investment. Cal. Veh. Code §§ 3061(b), (c). In this section of its brief, Folsom Chevrolet does little more than regurgitate Mr. Woodward's report in a vacuum, with almost no reference to the admissions Mr. Woodward made at the hearing or Mr. Gaspardo's criticisms of his work. As a result, the investments it claims are unreasonably inflated.

With respect to Mr. Gaspardo, Folsom Chevrolet dismisses his criticisms because, they claim, Mr. Gaspardo "has little to no background in the auto industry." (Br. at 37.) This statement seriously misrepresents the record. Mr. Gaspardo is a Harvard-trained economist with an MBA from the University of Chicago, and is the managing partner of his accounting firm. (RT Vol. 4, 120:1-121:22 (Gaspardo).) He testified that he has been involved in approximately 25 cases involving automotive accounting and financial issues, and has repeatedly been qualified to testify as an expert in those cases. (RT Vol. 4, 122:19-123:14 (Gaspardo).) Folsom Chevrolet's own counsel did not object to Mr. Gaspardo testifying as an expert in this case. ((RT Vol. 4, 123:15-24 (Gaspardo).) This is simply another hollow and unsupported attack against a GM expert, not a substantive rebuttal.

Turning now to the issue at hand, Folsom Chevrolet's investment numbers are inflated because it routinely claims assets and obligations as "permanent investments" of the dealership, when in reality they are none of those things. For example, Folsom Chevrolet first presents Mr. Crossan's personal guarantee of the floor plan as a dealership investment. (Br. at 35.) But by definition, this is not an investment of Folsom Chevrolet because it has no money at risk of loss. (GM PFF ¶ 364.) Even if Mr. Crossan's exposure were considered, though, there is no real risk that this guarantee will be needed, because Folsom Chevrolet has $3.6 million more in assets than in liabilities. (*Id.*) As a result, both Mr. Crossan and Mr. Woodward agreed they have no expectation that the guarantee will be called. (*Id.*)

Folsom Chevrolet next claims as a "more permanent asset" the dealership's equipment, which was "purchased at a cost of $1,010,264." (Br. at 35.) There is no way to determine whether any of these assets are, in fact, permanent, as no breakdown of the equipment was provided. (GM PFF ¶ 361.) However, even assuming their permanency, Folsom Chevrolet makes no adjustment to account for the depreciation or return on investment caused by actually using that equipment. This is rather like claiming that a 20-year old car with 200,000 miles is still worth the price you paid for it initially.

To that end, Folsom Chevrolet's accountants reported the book value of these items to be

$218,568 on its financial statements, while Mr. Woodward estimated the present-day value of the equipment to be $400,000. (*Id.*) In other words, it appears this equipment could be sold for more than its current value to Folsom Chevrolet, making the equipment fully recoverable. (*Id.*) Consequently, while there was an investment in equipment, its value has been or will be recouped, and that investment is not "permanent." (*Id.*)

With respect to the real property on which Folsom Chevrolet sits, that property is not owned by the dealership, but by a trust owned by Mr. Crossan. (GM PFF ¶ 365.) Thus, any amount paid to purchase those properties are not investments of the "franchisee" as considered by the Vehicle Code. (*Id.*) And while the difference may seem trivial, it is quite relevant in the context of termination. This is because even if Folsom Chevrolet as an entity were to cease to exist or be sold, Mr. Crossan would still own that land, and could continue to profit from it in various ways. (GM PFF ¶¶ 365-67.) If the land was held by the dealership entity itself, it would be much more difficult to separate those revenue streams or continue to lease the property after the fact.

In any event, the real estate investment is not permanent. Mr. Woodward estimated the cost of the property and facility at $4 million dollars, but estimated its current fair market value[17] at $7.5 million. (GM PFF ¶ 366.) Thus, Mr. Crossan would stand to gain approximately $3.5 million if he were to sell the property. (*Id.*) Mr. Woodward also estimated that the value could drop to $5.6 million if the property were long unoccupied, but that would still represent a positive return over the initial investment. (*Id.*) Mr. Crossan, meanwhile, estimated the value of the property even higher, at $7.5 to $8.5 million, but noted it could "easily exceed that amount of money." (*Id.*)

Alternatively, Mr. Crossan could choose to keep the property and continue to lease it. GM is obligated under the terms of the lease to rent that property until 2024. (GM PFF ¶ 367.) It also has obligations under the Dealer Agreement to occupy or find a buyer for the real estate if Folsom

[17] The sole basis for Mr. Woodward's valuation of the real estate owned by Mr. Crossan's trust was "[d]iscussing with someone at [Folsom Chevrolet's law] firm who talked to the dealer and [who gave] their best estimated value." (GM PFF ¶ 349.) There were no appraisals performed, and no documents have been produced showing the original cost of the property, the initial mortgage amount, or the present mortgage amount. (*Id.*)

Chevrolet were to be terminated. (*Id.*) Furthermore, although Folsom Chevrolet argues that GM can "walk away from the lease with 30 days notice" (Br. at 35), testimony at the hearing established that General Motors plans to continue to operate a Chevrolet dealership from the existing facility. (*See* RT Vol. 1, 204:13-21 (Stinson) ("we definitely want the point"); RT Vol. 4, 103:21-24, 113:4-16 (Meier); RT Vol. 4, 172:22-175:4, 236:21-22 (Gaspardo).) Thus, there is no real risk of loss, and accordingly, no permanent investment.

Folsom Chevrolet also states that its "goodwill and franchise value is highly permanent," citing to Mr. Woodward's testimony. (Br. at 35.) However, it omits any mention of Mr. Woodward's testimony that he doesn't "know where you tie [goodwill] into the word 'investment,'" and that "[i]t's possible it's not permanent." (RT Vol. 6, 32:8-15, 73:25-74:6 (Woodward).) This is because the goodwill value of Folsom Chevrolet—if any—can only be determined after an actual transaction is made. (GM PFF ¶ 371.) Folsom Chevrolet also argues that its goodwill value should be considered permanent because it reflects 25 years of work by Mr. Crossan, but this misses the mark. (Br. at 35.) The reality is that goodwill values are primarily driven by the profitability of the enterprise, and particularly by whether the dealership is "disproportionally profitable to the amount of money that needs to be invested to run the dealership." (RT Vol. 4, 226:25-228:14 (Gaspardo).)

For this reason, goodwill value is inherently volatile, subject to large swings as a result of, *e.g.*, termination of a franchise agreement, but also events like an economic downturn or the loss of a key supplier or customers. (*Id.*) As a result, goodwill is not an investment, but rather a "hoped for return." (GM PFF ¶ 368.) To the extent Mr. Crossan is concerned about losing this "hoped for return," there is a very ready market to sell the dealership which would permit him to realize that return. (GM PFF ¶ 370.) Because this amount "literally could be realized in a 30 or 60-day period by selling the dealership," it cannot be a permanent investment. (*Id.*)

Despite their lack of permanency, Folsom Chevrolet considers the above items to be "the most permanent asset type[s]" with a value of "$14,700,000." (Br. at 36.) However, it also asserts that its loss if terminated would be "approximately $8.675 million." (Br. at 37.) Both of these numbers are driven almost entirely by the real estate and goodwill values assigned by the dealership, neither of which is credible. (*See* P184 at 5-6.) These numbers also do not consider offsetting liabilities or the ability to recover funds, nor did Mr. Woodward make any effort to "subtract out nonpermanent assets" from this number. (GM PFF ¶ 351.)

Folsom Chevrolet also claims a total of $37 million in investments and obligations overall. (Br. at 37.) But even Mr. Woodward conceded that this number is "probably too high" and not "something that the judge should consider." (GM PFF ¶ 347.) In fact, this is simply a sum of all the assets held by the dealership, the real estate value "estimation," and the goodwill value provided by the dealership—again, without considering any offsetting liabilities whatsoever. (P184 at 5; GM PFF ¶ 351.) As described in GM's Opening Brief, the result of ignoring those liabilities is to massively inflate Folsom Chevrolet's claimed value. (GM Br. at 24.)

The only accurate measure of Folsom Chevrolet's investment continues to be its net worth, valued at about $3.6 million, while taking into account potential downward adjustments, including the significant returns already earned on that investment. (GM PFF ¶¶ 337-346.) Furthermore, a careful review of the record demonstrates that there are essentially no permanent (*i.e.*, non-recoverable) investments made in the dealership. (GM PFF ¶¶ 347-372.) Consequently, these factors support termination.

C. The Public Welfare is Harmed by Allowing Folsom Chevrolet to Remain as an Ineffective Dealer that Does Not Serve the Market (Cal. Veh. Code § 3061(d))

The fourth good cause factor analyzes "[w]hether it is injurious or beneficial to the public welfare" to terminate Folsom Chevrolet. Cal. Veh. Code § 3061(d). In its Opening Brief, General Motors described how Folsom Chevrolet's failure to adequately meet the demand of the consumers in the Folsom and Sacramento area shows that replacing Folsom Chevrolet with a vigorous, consumer-friendly dealer with lower prices, better customer satisfaction, and a stronger commitment to retail sales will benefit consumers. Conversely, if Folsom Chevrolet's Dealer Agreement is not terminated, the dealership will continue to provide inadequate operations for consumers in the market.

In its briefing, Folsom Chevrolet points to the potential loss of jobs and tax revenue in the city of Folsom. However, General Motors expects that any jobs lost by terminating the Folsom Chevrolet franchise would only be temporary. The evidence at the hearing showed that GM intends to immediately appoint a new, more zealous dealer in Folsom if this protest is denied. (GM PFF ¶ 123.) A more zealous dealer focused on retail sales and retail customers would likely hire more employees than Folsom Chevrolet employs at present, and generate more sales and tax revenue in the area. (*Id.*) Furthermore, any replacement dealer is likely to hire at least some of the existing Folsom Chevrolet employees back into the new store. (RT Vol. 1, 204:25-205:24 (Stinson).)

Folsom Chevrolet also argues that the "sheer size of the dealership is such that it clearly cannot be readily replaced." (Br. at 38.) However, this statement is unsupported by the record or any citation. Ranked solely by sales expectation, there are at least 30 dealers larger than Folsom Chevrolet in California. (R244.047.)

Folsom Chevrolet also points to Mr. Crossan's involvement in the community as a potential loss if the dealership is terminated. However, while Mr. Crossan's efforts to serve his local community are certainly laudable, it does not necessarily follow that General Motors may not terminate a contract that Folsom Chevrolet has repeatedly breached. Furthermore, Folsom Chevrolet's contributions are not irreplaceable; the total amount the dealership donated from 2013-2016 was $115,149, or just under $29,000 per year. (P021.001.) To put that number in context, the dealership's profits in 2016 alone were over $1.6 million. (R243E.001.) It therefore seems likely that any replacement dealer will be able to meet or exceed Folsom Chevrolet's financial contributions to the community. Accordingly, this factor favors termination.

D. Folsom Chevrolet Does Not have Adequate Dealership Resources and Warranty Services (Cal. Veh. Code §§ 3061(e)-(f))

The fifth and sixth good cause factors broadly consider whether Folsom Chevrolet is well equipped, in terms of sales and service facilities, personnel, equipment, and parts, to adequately serve the public, and whether it has met its warranty obligations. Cal. Veh. Code §§ 3061(e)-(f). In its Opening Brief, GM acknowledged that Folsom Chevrolet's facility is good and it has generally met its warranty obligations, but the dealership had issues with service satisfaction in 2014 that have never been explained. (GM Br. at 26-27.) Folsom Chevrolet's brief does not address these issues, nor does it address the 2016 warranty work that resulted in "catastrophic engine damage" to a Corvette, nor its sales of two vehicles subject to mandatory recalls for defective airbags. (*Id.*) These events are simply downplayed into "limited instances, anecdotal in nature," with no further explanation. (Br. at 40.)

GM also pointed out that the dealership has routinely operated without enough salespeople for years. (GM Br. at 26-27.) Folsom Chevrolet's only response is to argue that "General Motors never instructed Folsom Chevrolet to hire more people so that they could secure more sales." (Br. at 40.) However, it has been *Folsom Chevrolet's* goal to hire more salespeople for literally years, so it is not clear why General Motors would need to provide that instruction. (*See, e.g.*, RT Vol. 6, 186:1-187:24 (M. Crossan); Vol. 8, 138:6-139:7 (M. Crossan); Vol. 9, 83:22-84:9 (M. Crossan).) Overall, these factors do not support Folsom Chevrolet's claim that termination is unwarranted.

E. <u>Folsom Chevrolet has Committed Material Breaches of its Sales and Services Agreement (Cal. Veh. Code § 3061(g))</u>

The final "good cause" factor considers the "[e]xtent of franchisee's failure to comply with the terms of the franchise." Cal. Veh. Code § 3061(g). In its Opening Brief, GM provided a litany of Dealer Agreement terms which Folsom Chevrolet has breached, including provisions relating to sales, customer satisfaction, inventory, staffing, and personal services. (GM Br. at 28.)

Folsom Chevrolet's response is a confusing mix of irrelevant facts and outright invented claims. These include inaccurate and unsupported arguments regarding the standards for termination outlined in the Dealer Agreement, the standards under which the dealership's CSI performance is assessed, and GM's own conduct. (*See supra*, Argument § I(B)(1)-(3), (5).) As just one example, the dealership's claim that Section 5.1.1 "makes no distinction between Fleet and retail sales" cannot be maintained in light of the fact that that very section specifically states that Dealer must "comply with the ***<u>retail</u>*** sales standards established by General Motors." (Br. at 42; R201.009 § 5.1.1 (emphasis added).)

Folsom Chevrolet also argues that its compliance with the Dealer Agreement may only be assessed for those breaches specifically stated in the Notice of Termination. (Br. at 41.) This is in part an acknowledgment that there were other breaches of the Dealer Agreement by the dealership that Folsom Chevrolet would prefer not to address. However, as described above, the Notice of Termination specifically states that GM considered other information beyond just RSI and CSI scores in determining that termination was appropriate. (*See supra*, Argument § I(B)(5).)

Furthermore, Folsom Chevrolet's sole support for the claim that the Notice of Termination must state all evidence in support of termination is a citation to the Board's Proposal for Decision in the *Dependable Dodge* protest. (Br. at 41.) However, that decision is currently subject to judicial review in California Superior Court and is likely to be overturned, at least in part because it does not follow California precedent on this point. Contrary to Folsom Chevrolet's claims, "[i]n determining whether good cause has been established, the Board ***must*** consider all of the factors set forth in section 3061 for which evidence has been presented from any party." *Ford Motor Co. v. New Motor Vehicle Bd.*, Cal. Super. Ct., No. 96CS0247, at 3 (Jan. 29, 1997) (emphasis added); *see also id.* at 3 (The reasons listed in the notice of termination did not "limit the Board as to the [section 3061] factors it could consider had evidence been presented on any additional factors by either party.").

The only argument left to be addressed is the claim that, because Folsom Chevrolet has earned money under the Standards for Excellence ("SFE") program, it should not be terminated. (Br. at 43.) This argument is truly baseless. Earning SFE incentives requires only one thing with regards to sales: that the dealership "sell one more [vehicle] than they did the prior year the same month." (RT Vol. 1, 197:12-199:19 (Stinson).) In other words, if a dealership sells 50 vehicles in March 2015, it can receive SFE incentive money by selling 51 vehicles or more in March 2016. There is no relationship whatsoever between SFE incentive payments and a dealership's RSI achievement. (RT Vol. 4, 109:15-17 (Meier).) [18]

Folsom Chevrolet inexplicably claims that paying out this incentive is "entirely unfair," because "a dealer's failure to meet RSI is not even seen by General Motors as sufficiently material to withhold incentive funds." (Br. at 43-44.) The dealership's contention is partially correct: the achievement of a certain RSI is not required to earn payments under some programs, including SFE. However, Folsom Chevrolet is confused as to the reasons for this approach. It is not that failing to

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[18] This point was also made in bold, italicized text in each quarterly contact letter sent to the dealership. (*See, e.g.*, R212.001 ("Please be reminded that sales performance as measured by programs such as Standards for Excellence (SFE), Mark of Excellence, and Regional or National sales campaigns does not relieve your dealership of the RSI responsibilities outlined above.").)

meet RSI is not "material" to General Motors—this proceeding is evidence to the contrary. Rather, the reason GM does not withhold those funds is because it would doubly punish low-performing dealers. Without any incentive money, they would not be at a level playing field compared to their competitors. (RT Vol. 4, 106:18-107:6 (Meier).) It is not clear why Folsom Chevrolet thinks this system would be better, but it is hard to imagine it would be happier if GM had decided not to pay the dealership hundreds of thousands of dollars in incentive money that it otherwise qualified for.

The truth is that the calculations needed to determine satisfactory sales performance as measured by RSI are far more complex than "one more than last year," but this complexity is precisely what makes RSI metric reasonable. More to the point, RSI is the method specified in the Dealer Agreement for assessment of sales performance, not SFE. (GM PFF ¶¶ 20-21.) Folsom Chevrolet's failure to meet or even approach those sales performance obligations, as well as its obligations relating to customer satisfaction, inventory, staffing, and personal services, are clear and material breaches of the Dealer Agreement it signed. (GM Br. at 28.) Folsom Chevrolet's failure to remedy those breaches over a period of years, despite GM's constant and focused assistance, mean that termination of the contract is warranted.

CONCLUSION

For the reasons outlined above and in General Motors' Opening Brief, good cause exists to terminate Folsom Chevrolet's Dealer Agreement.

Dated: June 22, 2018

Respectfully submitted,

Robert E. Davies, Esq. (California Bar No. 106810)
Mary A. Stewart, Esq. (California Bar No. 106758)
Donahue Davies LLP

~and~

Mark T. Clouatre, Esq. (Colorado Bar No. 29892)
Jacob F. Fischer, Esq. (New York Bar No. 5025788)
Nelson Mullins Riley & Scarborough LLP

Counsel for General Motors LLC

PROOF OF SERVICE

CAPTION: FOLSOM CHEVROLET, INC. d/b/a FOLSOM CHEVROLET, Protestant v. GENERAL MOTORS, LLC, Respondent

BOARD: NEW MOTOR VEHICLE BOARD

PROTEST NOS.: PR-2483-16

I am employed in the County of Sacramento, State of California. I am over the age of 18 years and not a party to this action. My business address is 1 Natoma Street, Folsom, California 95630. On **June 22, 2018**, I served the foregoing **RESPONDENT GENERAL MOTORS LLC'S REPLY TO PROTESTANT'S POST-HEARING BRIEF** on each party in this action, as follows:

Halbert Rasmussen
Scali Rasmussen
800 Wilshire Boulevard, Suite 400
Los Angeles, CA 90017
Telephone: (213) 239-5622
Email: hrasmussen@scalilaw.com

Attorneys for Protestant

☒ (BY MAIL) I caused such envelope to be deposited in the United States Mail at Sacramento, California, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing documents for mailing. It is deposited with the United states postal service each day and that practice was followed in the ordinary course of business for the serve herein attested to.

☐ (BY FACSIMILE) The facsimile machine I used complied with California Rules of Court, Rule 2003, and no error was reported by the machine. Pursuant to California Rules of Court, Rule 2006(d), I caused the machine to print a transmission record of the transmission, a copy of which is attached to this Affidavit.

☐ (BY FEDERAL EXPRESS) I caused such envelope to be delivered by air courier, with the next day service.

☒ (BY E-MAIL) at the e-mail address listed above.

Executed on **June 22, 2018**, at Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct.

Dawne Camilleri